Supreme Court, U.S.
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No. 04-500

In The
# Supreme Court of the United States

BENNETT LEVIN,

*Petitioner,*

v.

UPPER MAKEFIELD TOWNSHIP, BUCKS COUNTY, PENNSYLVANIA; ROSE MARIE SAUTER; CONRAD BALDWIN; WILLIAM GUNSER; EDWARD X. FORD; JOHN TITTERTON; LAWRENCE SALTZMAN; JOHN WALSH; BARBARA HIRST; ROBERT GORRING; ERIC FISHER; MICHAEL FRANK; STEVEN HARRIS, ESQUIRE; GREGORY STURN, ESQUIRE; HARRIS & HARRIS, ATTORNEYS;

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether, in lawsuits challenging municipal zoning and other land-use decisions, a substantive due process claim can be established only if the challenged conduct meets the "shocks the conscience" test?

TABLE OF CONTENTS


| | Page |
|---|---|
| PETITION FOR A WRIT OF CERTIORARI | 1 |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS | 2 |
| STATEMENT OF THE CASE | 2 |
| A. Respondents' Actions to Prevent Petitioner From Obtaining Permission to Build a Home on His Land | 3 |
| B. The Decisions by the District Court and Court of Appeals | 8 |
| REASONS FOR GRANTING THE PETITION | 9 |
| A. The Myriad and Conflicting Tests Applied by the Circuit Courts To Substantive Due Process Claims Challenging Zoning Decisions Have Created a Veritable Quagmire | 12 |
| B. This Court's Decision in *Lewis* Did Not Compel Application of the "Shocks the Conscience" Test to All Substantive Due Process Claims | 17 |
| CONCLUSION | 20 |

## TABLE OF AUTHORITIES

Page

CASES

*Anderson v. Collins*, No. 2:96-CV-269, 1998 WL 1031496 (E.D. Ky. July 14, 1998) ..... 11, 12

*Bickerstaff Clay Products Co. v. Harris County*, 89 F.3d 1481 (11th Cir. 1996) ..... 16

*Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102 (8th Cir. 1992) ..... 15

*Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161 (9th Cir. 1993) ..... 16

*County of Sacramento v. Lewis*, 523 U.S. 833 (1998) ...*passim*

*Crider v. Board of County Comm'rs of Boulder*, 246 F.3d 1285 (10th Cir.), *cert. denied*, 534 U.S. 890 (2001) ..... 16

*Durigan v. Sanitary Dist. No. 4-Town of Brookfield*, 5 Fed. Appx. 492 (7th Cir. 2001) ..... 15

*Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) ... 13, 15, 16

*FM Props. Operating Co. v. City of Austin*, 93 F.3d 167 (5th Cir. 1996) ..... 14, 15

*George Wash. University v. District of Columbia*, 318 F.3d 203 (D.C. Cir. 2003) ..... 17

*Harlen Associates v. Inc. Vill. of Mineola*, 273 F.3d 494 (2d Cir. 2001) ..... 14

*Iowa Coal Mining Co. v. Monroe County*, 257 F.3d 846 (8th Cir. 2001) ..... 15

*Natale v. Town of Ridgefield*, 170 F.3d 258 (2d Cir. 1999) ..... 14

*Nectow v. City of Cambridge*, 277 U.S. 183 (1928) ..... 13

*Patel v. Penman*, 103 F.3d 868 (9th Cir. 1996) ..... 16

TABLE OF AUTHORITIES – Continued

Page

*Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992) ..... 3, 11, 13, 16, 17

*Pro-Eco, Inc. v. Board of Comm'rs of Jay County*, 57 F.3d 505 (7th Cir. 1995) ..... 15

*RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911 (2d Cir. 1989) ..... 11

*Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208 (11th Cir. 1995) ..... 17

*Silverman v. Barry*, 845 F.2d 1072 (D.C. Cir.), *cert. denied*, 488 U.S. 956 (1988) ..... 17

*Simi Inv. Co., Inc. v. Harris County, Tex.*, 236 F.3d 240 (5th Cir. 2000) ..... 15

*S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498 (9th Cir. 1990) ..... 16

*Sylvia Development Corp. v. Calvert County*, 48 F.3d 810 (4th Cir. 1995) ..... 14

*Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430 (4th Cir. 2002) ..... 14

*United Artists v. Township of Warrington*, 316 F.3d 392 (3d Cir. 2003) ..... *passim*

*Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) ..... 13

*Whitley v. Albers*, 475 U.S. 312 (1986) ..... 18, 19

STATUTES

28 U.S.C. § 1254(1) ..... 1

42 U.S.C. § 1983 ..... 2, 8, 17

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

Eric Jenkins, *Challenging Land Use Actions Under Section 1983*, 74 Wash. L. Rev. 853 (1999)..... 10, 12

Stewart M. Wiener, *Substantive Due Process in the Twilight Zone: Protecting Property Interests From Arbitrary Land Use Decisions*, 69 Temp. L. Rev. 1467 (1996) ..... 9, 12

## PETITION FOR A WRIT OF CERTIORARI

Petitioner Bennett Levin respectfully requests that this Court grant his petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

## OPINIONS BELOW

The opinion of the Court of Appeals is not published, and is reproduced in the Appendix to this Petition ("App.") at App. 1-34. The Court of Appeals' order denying the petition for rehearing and rehearing *en banc* is unpublished and is reproduced at App. 88-89. The opinion of the United States District Court for the Eastern District of Pennsylvania granting summary judgment against Petitioner is unpublished, and is reproduced at App. 35-60.

## JURISDICTION

The Court of Appeals entered judgment on March 8, 2004, and denied a timely petition for rehearing and rehearing *en banc* on May 13, 2004. App. 33, 88. On July 30, 2004, Justice Souter granted an extension of time within which to file a petition for a writ of certiorari, up to and including September 10, 2004. On August 30, 2004, Justice Souter granted a second extension of time, up to and including October 12, 2004. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Title 42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983.

The Fourteenth Amendment provides, in pertinent part, that no State shall "deprive any person of life, liberty, or property, without due process of law."

## STATEMENT OF THE CASE

This case presents the unsettled and important issue of what test should be utilized by the lower courts in determining whether local zoning and other land-use actions constitute a substantive due process violation for purposes of Section 1983. The court of appeals relied on this Court's decision in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), and held that the "shocks the conscience" test applies to *all* substantive due process claims, including those arising in the zoning and land-use context. (App. 15 n.2). Thus, the court of appeals upheld the entry of summary judgment against Petitioner on his Section 1983 claim, even though the district court had acknowledged,

after reviewing all of the evidence, that "[t]his chain of events strongly points to a bad motive and purposeful intention to delay issuing the Plaintiff a final building permit." (App. 54).

This Court's decision in *Lewis* involved a high-speed police chase, whereas exigent circumstances rarely, if ever, exist in the zoning arena. Indeed, in dissenting from the Third Circuit's initial decision to extend the *Lewis* "shocks the conscience" test to land-use cases, Judge Robert Cowen characterized that extension as "the jurisprudential equivalent of a square peg in a round hole," and lamented the Third Circuit's abandonment of its prior "improper motive" test. *United Artists v. Township of Warrington*, 316 F.3d 392, 407 (3d Cir. 2003) (Cowen, J., dissenting).

The Third Circuit's decision not only represents an unwarranted extension of *Lewis*, it also conflicts with decisions by other courts of appeals. As observed over a decade ago in *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1214 (6th Cir. 1992), "the circuits [are] deeply divided concerning the theories to be employed in federal court cases challenging zoning." That conflict has persisted since *Pearson*, and this case presents an ideal vehicle for the Court to provide much-needed guidance to the lower courts regarding the proper test to be utilized in evaluating substantive due process claims arising from zoning and other land-use decisions.

### A. Respondents' Actions to Prevent Petitioner From Obtaining Permission to Build a Home on His Land

Petitioner purchased an unimproved seven acre tract of land in Upper Makefield Township, Pennsylvania (the

"Township") in June 1997 for the purpose of constructing a single family home for him and his wife. The tract is bordered on one side by the Delaware River and on the other by the Delaware Division of the Pennsylvania Canal, and is located within the Flood Fringe Area of the Delaware River Flood Plain. (App. 2). Significantly, there are at least eight single family homes located within a one and one-half mile radius of Petitioner's land, and all of these homes are in the flood plain. (App. 75, 85).

In November 1997, Petitioner submitted a zoning variance application to the Township Zoning Hearing Board to permit the construction of a single family residence on his land. (App. 5) Along with the zoning application, Petitioner submitted the required "HEC-II" study by a registered professional engineer. (App. 6). The study showed that construction of a single family home on the property would not result in any rise in the 100-year flood levels. (App. 75).

On December 17, 1997, the Township Supervisors held a public meeting at which they voted to oppose Petitioner's zoning application before the Zoning Hearing Board. (App. 36). None of the Supervisors had even read the zoning application before the meeting. (*Id.*). Petitioner had not been given notice of the December 17, 1997 meeting, and thus neither Petitioner nor his attorney attended that meeting. (*Id.* n.3).

On August 13, 1998, the Zoning Hearing Board issued an opinion rejecting Petitioner's zoning application. (App. 127-143). Petitioner then filed a land-use appeal with the Bucks County Court of Common Pleas on September 9, 1998. (App. 37). On February 23, 1999, Common Pleas Judge John Rufe issued a Memorandum Opinion and

Order reversing the Zoning Hearing Board and granting Petitioner's application for a zoning variance. (App. 61-65). Judge Rufe concluded that "[t]he Zoning Hearing Board strained logic and reason at every juncture to deny appellant's application." (App. 64). He rejected the Zoning Hearing Board's professed concerns about safety and potential flooding, emphasizing that others had been allowed to build homes near Petitioner's land: "The accompanying arguments advanced by the Board about safety concerns because the Delaware River occasionally overflows the banks and floods River Road are misplaced in a variance application, unless the Township sees it as its responsibility under its inherent police powers, for the safety of its residents, to condemn all other residences situate in the same floodplain, and evict such residents." (App. 64).

After the Township Supervisors voted to appeal the foregoing ruling, Judge Rufe issued another opinion on May 7, 1999. (App. 66-80). He found that the Zoning Hearing Board's reasons for denying the Zoning application were "astounding," "greatly disturbing," "troubling," "unsubstantiated," "extremely speculative," "unfounded," and "completely without factual support." (App. 71-80). Judge Rufe declared that the testimony relied upon by the Zoning Hearing Board was "shocking for the amount of information it fails to contain," and observed that "the Board would have been shocked and insulted if Petitioner had presented this kind of vague, speculative and inconsequential testimony in support of his Application." (App. 74). Judge Rufe pointed out that "[t]he intervening property owners [who opposed Petitioner's application] are all located within immediate proximity to the proposed site. They are all homeowners whose houses are in the floodplain."

(App. 75). Judge Rufe concluded that the denial of Petitioner's zoning application had been a foregone conclusion and the application process had been an exercise in futility:

> [T]he sections of the Ordinance which allow for a party to seek a variance to build a single family home in the flood fringe are there only so that the municipality can qualify for federal assistance. . . . [T]he Township does not intend to allow any person to build a new structure in the floodplain. *Thus, Petitioner's application was decided long before any testimony was presented to the Board.* (App. 80) (emphasis added).

The Township appealed to the Commonwealth Court of Pennsylvania, which affirmed Judge Rufe's rulings on May 11, 2000. (App. 81-85).

On May 17, 2000, just six days after the Commonwealth Court affirmed Judge Rufe's decision, the Supervisors discussed the idea of amending the Canal Setback Ordinance to require a 100-foot building setback along the Canal. (App. 38). The amended ordinance would have severely limited Petitioner's ability to develop his property, and would have required another zoning variance. (*Id.*) At the November 1, 2000 Supervisors meeting, 140 members of the public, most of whom would have been affected by the proposed ordinance, came to express their opposition. (App. 38-39). Due to the groundswell of opposition, the Board of Supervisors abandoned the proposed ordinance. (App. 39).

After the November 1, 2000 meeting, one of the Township supervisors told a resident whose home borders the Canal that the proposed amendment was not intended to impact those residents already living on the Canal, but

instead was to protect the Canal region from new development. (App. 39 n.7). Petitioner's property was the only potential new development bordering the Canal. (*Id.*).

On May 24, 2000, approximately two weeks after the ruling by the Commonwealth Court in Petitioner's favor, Petitioner submitted a zoning permit application, a foundation construction permit application, a construction cost estimate, plans for the proposed single-family residence, and plans for the foundation of the residence. (App. 39).

On June 12, 2000, the Township filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court. (*Id.*). The Township also notified Petitioner that it would not issue the foundation or zoning permits until the Supreme Court ruled on its appeal. (*Id.*) However, the Township cashed Petitioner's $2,300 check for the foundation building permit. (App. 39-40). Petitioner filed for a grading permit on August 23, 2000, but again was told by the Township that no permits would be issued until the appeal was resolved by the Pennsylvania Supreme Court. (App. 39).

On November 9, 2000, the Pennsylvania Supreme Court denied the Township's appeal. (App. 87). However, Petitioner was not issued a grading permit until late Spring 2001; was not issued a foundation permit until November 2001; and was not issued a final building permit until February 5, 2002 – almost one and one-half years after he had won his legal battle with the Township in the Pennsylvania Supreme Court. (App. 40).

### B. The Decisions by the District Court and Court of Appeals

The district court granted summary judgment against Petitioner on his claim that respondents violated his right to substantive due process under 42 U.S.C. § 1983. The court acknowledged that Petitioner had established a property interest entitled to substantive due process protection. (App. 48-49). However, the court noted that, subsequent to the decision in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), the Third Circuit had overruled its "improper motive" test for evaluating substantive due process claims in land-use regulation cases. (App. 50-51). Instead, in *United Artists v. Township of Warrington*, 316 F.3d 392 (3d Cir. 2003), the Third Circuit held that the "shocks the conscience" test set forth in *Lewis* should apply to all substantive due process claims, including those arising in the zoning and land-use context.

The district court stated that the "strongest" evidence of wrongful conduct by the defendants was "(i) the Township delayed issuing a final building permit to the Plaintiff after the Pennsylvania Supreme Court denied allocatur; (ii) the dubious tactic of cashing Plaintiff's $2,300 permit fee before issuing any of the requested permits; and (iii) [Supervisor] Edward Ford's conversation with Mr. Pushman [a nearby resident] that implied that the proposed Setback Ordinance was only intended to restrict Plaintiff from building on his Property." (App. 54).

The court concluded that "[t]his chain of events *strongly points to a bad motive and purposeful intention to delay issuing the Plaintiff a final building permit*, but it does not foster a finding that Defendants' behavior

shocked-the-conscience." (App. 54) (emphasis added). The court stated that, even though plaintiff had adduced evidence of "Defendants' questionable and unscrupulous behavior," that evidence did not rise to the level of "shocking-the-conscience." (App. 55). Accordingly, it entered summary judgment against Petitioner.

On appeal, the Third Circuit affirmed. (App. 1-32). Just as the district court had done, the court of appeals ruled that Petitioner's ownership of the land was a property interest that is entitled to substantive due process protection (App. 13), but it then went on to find that none of the conduct complained of satisfied the "shocks the conscience" standard it adopted in *United Artists*. (App. 25).

## REASONS FOR GRANTING THE PETITION

In preventing Petitioner's substantive due process claim from reaching a jury, the court of appeals applied a "shocks the conscience" test that severely reduces the constitutional protections available to citizens who have been subjected to unlawful and improperly motivated zoning and land-use decisions. That draconian test essentially gives local zoning officials *carte blanche* to infringe upon property rights, and deprives the injured landowner of any realistic means of vindicating the constitutional right to substantive due process. *See* Stewart M. Wiener, *Substantive Due Process in the Twilight Zone: Protecting Property Interests From Arbitrary Land Use Decisions*, 69 Temp. L. Rev. 1467, 1493 (1996) ("Some courts require the decision to be so wrongful as to 'shock the conscience,' *a standard that bars practically every zoning claim.*")

(emphasis added); Eric Jenkins, *Challenging Land Use Actions Under Section 1983*, 74 Wash. L. Rev. 853, 860 (1999) (utilization of the "shocks the conscience" test "*is a virtual bar to substantive due process actions.*") (emphasis added).

As pointed out by Judge Cowen's dissenting opinion in *United Artists*, extension of the "shocks the conscience" test from the realm of high-speed police chases in *Lewis* to the entirely dissimilar context of zoning and land-use decisions, which involve calculated, deliberate actions, "leaves the door ajar for intentional and flagrant abuses of authority by those who hold the sacred trust of local public office." 316 F.3d at 406-7. Judge Cowen elaborated as follows:

> 'Shocks the conscience' is a useful standard in high speed police misconduct cases which tend to stir our emotions and yield immediate reaction. But it is less appropriate, and does not translate well, to the more mundane world of local land use decisions, where lifeless property interests (as opposed to bodily invasions) are involved. In this regard, it appears rather difficult to analogize the intentional and illegal denial of a building permit to the forced pumping of the human stomach, the infamous fact pattern that begat 'shocks the conscience' as a term of constitutional significance . . . It is the jurisprudential equivalent of a square peg in a round hole.

*United Artists*, 316 F.3d at 407 (Cowen, J., dissenting).

Local zoning authorities are vested with great discretionary power that is often exercised in an overtly political and capricious fashion. The courts must provide meaningful protection against significant abuses of that power. In

so doing, the courts will affirm their place as the guardian of our constitutionally protected rights against overreaching bureaucrats filled with "the insolence of office." William Shakespeare, Hamlet act 3, sc. 1. As Judge Cowen argued in his dissent in *United Artists*, "[t]he concern that the federal judiciary will become a local zoning board takes a permanent back seat to the federal judiciary's obligation to protect the core constitutional freedoms of the American public from *deliberate* and *intentional* governmental deprivation." 316 F.3d at 407 (emphasis in original).

While this Court in recent years has decided cases that clarify the relevant standards for analysis of constitutional challenges to land use regulation in the takings, procedural due process and equal protection contexts, it has not yet squarely addressed the substantive due process limitations on local land-use regulators' actions that affect protected property interests. This has led the lower courts and commentators alike to bemoan for a number of years the conflicting and confusing state of the law in this area. *See, e.g., Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1214 (6th Cir. 1992) ("the circuits [are] deeply divided concerning the theories to be employed in federal court cases challenging zoning"); *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 914 (2d Cir. 1989) ("Federal courts have followed a somewhat uneven course in explicating the rationale for and the extent to which the substantive component of the Due Process Clause of the Fourteenth Amendment protects landowners in disputes with local agencies empowered to limit the permissible uses of their property"); *Anderson v. Collins*, No. 2:96-CV-269, 1998 WL 1031496, at *3 (E.D. Ky. July 14, 1998) (observing that "federal courts' treatment of

substantive due process in the area of zoning and land use . . . is unsettled and diverse"); Wiener, 69 Temp.L.Rev. at 1473, 1499 (observing that "the circuits have varied widely in their approaches" to "the standard by which a zoning decision may be considered arbitrary and capricious" and stating the Supreme Court should "resolve the confusion among the federal courts"); Jenkins, 74 Wash.L.Rev. at 857 ("the federal circuits have myriad approaches to hearing substantive due process claims").

This case, which has an extensive factual record as well as several state and federal lower court opinions, presents an ideal vehicle for this Court to articulate the standard against which to judge substantive due process challenges to local zoning and land-use regulation, thereby ensuring more consistent treatment of similar claims nationwide.

### A. The Myriad and Conflicting Tests Applied by the Circuit Courts To Substantive Due Process Claims Challenging Zoning Decisions Have Created a Veritable Quagmire

This Court has emphasized that "[t]he touchstone of due process is protection of the individual against arbitrary action of government . . . whether the fault lies in a denial of fundamental procedural fairness . . . or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998). Although the Court's decision in *Lewis* certainly suggests that government action exercised other than "in the service of a legitimate governmental objective" would run afoul of due process protections, the federal courts' application of the substantive aspect of this principle to property owners'

challenges to zoning and other land-use regulation by local zoning authorities has been anything but consistent and clear.

As the Sixth Circuit has observed, "the circuits [are] deeply divided concerning the theories to be employed in federal court cases challenging zoning." *Pearson*, 961 F.2d at 1214. Moreover,

> The circuits are in substantial disagreement on the role of the federal courts in reviewing zoning claims of [the 'arbitrary and capricious' substantive due process] kind. Although the Supreme Court has held that federal review of local zoning on arbitrary and capricious substantive due process grounds is valid in appropriate cases, *it has never laid down definitive standards of review*.

*Id.* at 1217 (emphasis added) (citing *Nectow v. City of Cambridge*, 277 U.S. 183, 187 (1928); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 373 (1926); and *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977)).

Indeed, the wide disparity and conflict among the circuit courts' decisions on this issue led the *Pearson* court to exclaim,

> We wish it were within our power to harmonize these decisions, *but the conflicts among circuits are too great. Harmony will have to await action by the Supreme Court*.

961 F.2d at 1220 n.45 (emphasis added).

The conflicts observed by the *Pearson* court in 1992 have, if anything, worsened since then. While the First

and Sixth Circuits have, like the Third Circuit, adopted a "shocks the conscience" test, other Circuits utilize myriad different tests.

In the Second Circuit, in zoning cases, "'substantive due process . . . standards are violated only by conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority.'" *Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 505 (2d Cir. 2001) (*quoting Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir. 1999)).

In contrast, the Fourth Circuit applies the traditional "rational basis" test regularly applicable to legislative actions. *See, e.g., Tri-County Paving, Inc. v. Ashe County,* 281 F.3d 430, 440 (4th Cir. 2002) (holding that the challenged zoning determinations "clearly did not fall beyond the outer limits of legitimate governmental action. In fact, quite the opposite is true. The County's actions were rationally related to a legitimate governmental purpose"); *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4th Cir. 1995) ("In more recent decisions, the Supreme Court has narrowed the scope of substantive due process protection in the zoning context so that such a claim can survive only if the alleged purpose behind the state action has no conceivable rational relationship to the exercise of the state's traditional police power through zoning.").

The Fifth Circuit, likewise, requires a legitimate government interest: "[G]overnment action comports with substantive due process if the action is rationally related to a legitimate government interest. . . . Only if such government action is 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare,' may it be declared unconstitutional."

*FM Props. Operating Co. v. City of Austin*, 93 F.3d 167, 174 (5th Cir. 1996). *Accord Simi Inv. Co., Inc. v. Harris County, Tex.*, 236 F.3d 240, 251 (5th Cir. 2000) (no substantive due process violation if challenged conduct "is rationally related to a legitimate governmental interest").

In the Seventh Circuit, "[l]and use regulations satisfy substantive due process if they do not violate a specific constitutional guarantee and are rationally related to a legitimate governmental interest." *Durigan v. Sanitary Dist. No. 4-Town of Brookfield*, 5 Fed. Appx. 492, 494-95 (7th Cir. 2001). *See also Pro-Eco, Inc. v. Bd. of Comm'rs of Jay County*, 57 F.3d 505, 514 (7th Cir. 1995) ("In order to claim that a zoning ordinance interferes with its substantive rights, [a claimant] must be able to demonstrate either that the ordinance infringes a fundamental liberty interest, . . . or that the ordinance is 'arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.'") (*quoting Euclid*, 272 U.S. at 395).

The Eighth Circuit has characterized its substantive due process standard as requiring the claimant to demonstrate "something more than that the government decision was arbitrary, capricious, or in violation of state law," to show that the zoning action is "truly irrational." *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104 (8th Cir. 1992). *Accord Iowa Coal Mining Co. v. Monroe County*, 257 F.3d 846, 853 (8th Cir. 2001) (re-zoning of plaintiff's land was not "truly irrational").

The Ninth Circuit "will subject local zoning decisions to substantive due process review, but the scope of review is that for legislation, even as to an individual property owner's claim, and any relationship to a proper zoning

goal, such as prevention of traffic congestion, will be sufficient." *Pearson*, 961 F.2d at 1219 (emphasis added) (citing *S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 507 (9th Cir. 1990)). *See also e.g.*, *Patel v. Penman*, 103 F.3d 868, 874 (9th Cir. 1996) ("To establish a violation of substantive due process in [a zoning] context, a plaintiff is ordinarily required to prove that a challenged government action was 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.'") (*quoting Euclid*, 272 U.S. at 395); *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 165 (9th Cir. 1993) (stating that the requirement that the challenged action "need only be rationally related to a legitimate state interest . . . also applies to substantive due process challenges to property zoning ordinances").

In the Tenth Circuit, on the other hand, "the arbitrary and capricious standard . . . has been applied in the context of zoning." *Crider v. Bd. of County Comm'rs of Boulder*, 246 F.3d 1285, 1289 (10th Cir.), *cert. denied*, 534 U.S. 890 (2001). Moreover, "the arbitrary and capricious standard in the context of zoning 'does not mean simply erroneous.' . . . Rather . . . such a claim can survive only if the alleged purpose behind the state action has no conceivable rational relationship to the exercise of the state's traditional police power through zoning." *Id.*

Under the decisions of the Eleventh Circuit, "[t]he substantive component of the Due Process Clause prohibits a government entity from applying to property a zoning classification that bears no relationship to the 'public health, safety, morals, or general welfare' and thus is beyond the government's police power." *Bickerstaff Clay Prods. Co. v. Harris County*, 89 F.3d 1481, 1489 (11th Cir.

1996). *See also Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208, 1214 (11th Cir. 1995) ("Substantive due process challenges to zoning regulations are analyzed under the rational basis standard. . . . Under this standard, a zoning decision will be upheld if it has a 'rational relationship with a legitimate general welfare concern.'").

Finally, "the District of Columbia Circuit applie[s] a very deferential standard of review under substantive due process. It [has] held that '[o]nly a substantial infringement of state law prompted by personal or group animus, or a deliberate flouting of the law that trammels significant personal or property rights, qualifies for relief under § 1983.'" *Pearson*, 961 F.2d at 1219 (*quoting Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir.), *cert. denied*, 488 U.S. 956 (1988)). *Accord George Wash. Univ. v. District of Columbia*, 318 F.3d 203, 209 (D.C. Cir. 2003).

Granting certiorari in this case will enable the Court to end the longstanding and rampant confusion among the federal appellate courts and to establish definitive and uniform nationwide standards for substantive due process review in zoning and other land-use cases.

### B. This Court's Decision in *Lewis* Did Not Compel Application of the "Shocks the Conscience" Test to All Substantive Due Process Claims

The Third Circuit concluded in *United Artists* that the "shocks the conscience" test in *Lewis* should apply to all substantive due process claims, specifically including those arising in the zoning and land-use context. However, there is nothing in this Court's opinion in *Lewis* that suggests that the Court intended its holding to reach so broadly.

In *Lewis*, this Court granted certiorari "to resolve a conflict among the Circuits over the standard of culpability on the part of a law enforcement officer for violating substantive due process in a pursuit case." 523 U.S. at 839. The Court explained that rules of due process are not "subject to mechanical application," and "[d]eliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking." *Id.* at 850.

Of particular significance here is the Court's recognition in *Lewis* that substantive process claims which arise from "normal pretrial custody" present "markedly different circumstances" than those which arise from "high-speed law enforcement chases." *Id.* at 851. In a pretrial custody case, the "deliberate indifference" test makes sense because "actual deliberation is practical," and "forethought about an inmate's welfare is not only feasible but obligatory." *Id.* By contrast, the "deliberate indifference" test does not suffice for constitutional liability where there are exigent circumstances, such as high-speed police chases or prison riots. *Id.* at 852-53. The Court found "instructive" in this regard its analysis in *Whitley v. Albers*, 475 U.S. 312, 320 (1986):

> [I]n making and carrying out decisions involving the use of force to restore order in the face of a prison disturbance, prison officials undoubtedly must take into account the very real threats the unrest presents to inmates and prison officials alike, in addition to the possible harms to inmates against whom force might be used . . . In

> this setting, a deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey *the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance.*

523 U.S. at 852 (emphasis added).

Zoning decisions of the type involved in this case involve "actual deliberation" and "forethought," and are *not* "made in haste, under pressure, and frequently without the luxury of a second chance." *Id.* at 851, 852. Thus, as Judge Cowen correctly recognized in *United Artists*, while the "shocks the conscience" test is appropriate for high-speed police chases, "it is less appropriate, and does not translate well, to the more mundane world of local land use decisions . . . It is the jurisprudential equivalent of a square peg in a round hole." *United Artists*, 316 F.3d at 407 (Cowen, J., dissenting).

Review is warranted because the Third Circuit's adoption of the "shocks the conscience" test for substantive due process claims asserted in zoning and land-use cases is inconsistent with this Court's admonition in *Lewis* that different standards should be utilized in cases where (as here) "actual deliberation is practical," as opposed to those where (as in *Lewis*) "fast action" is required, because such cases present "markedly different circumstances." 523 U.S. at 851, 853.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October, 2004

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No: 03-1860

BENNET LEVIN,

Appellant,

v.

UPPER MAKEFIELD TOWNSHIP, BUCKS COUNTY, PENNSYLVANIA; ROSE MARIE SAUTER; CONRAD BALDWIN; WILLIAM GUNSER; EDWARD X FORD; JOHN TITTERTON; LAWRENCE SALTZMAN; JOHN WALSH; BARBARA HIRST; ROBERT GORRING; ERIC FISHER; MICHAEL FRANK; STEVEN HARRIS, ESQUIRE; GREGORY STURN, ESQUIRE; HARRIS & HARRIS, ATTORNEYS; JOHN DEVLIN; MARY DEVLIN; JONATHAN LAMM; MARY LAMM; THOMAS KOVACEVICH; MARY KOVACEVICH; DEBORAH DEVLIN; DONNA V. LAMM.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(Civ. No. 99-cv-05313)
District Judge: Hon. Legrome D. Davis

Submitted Pursuant to Third Circuit LAR 34.1(a)
February 12, 2004.

Before SCIRICA, *Chief Judge*, and
ROTH and MCKEE, *Circuit Judges*

Filed: March 8, 2004

## OPINION

McKEE, *Circuit Judge*.

Bennet Levin has filed this appeal from the district court's grant of summary judgment in favor of the defendants in his § 1983 action in which he alleged that the defendants' conduct in opposing his application for a zoning variance violated his substantive due process rights and constituted state law torts of civil conspiracy and abuse of process. For the reasons that follow, we will affirm the district court.

## I. FACTUAL BACKGROUND

In June 1997, Levin purchased two lots, approximating seven acres of unimproved land (the "Property") bisected by River Road in Upper Makefield Township, Bucks County, Pennsylvania. Levin wanted to build a single family home on the 4.009 acre lot for himself and his wife. The Property borders the Delaware River on one side and the Delaware Division of the Pennsylvania Canal on the other. As a result of its location and topography, the Property is classified as being located in a floodplain as depicted on Federal Emergency Management Administration maps and as set forth in the Township's Joint Municipal Zoning Ordinance ("JMZO"). The Property is zoned Conservation Management Zoning District ("CMZD"). Levin claims that the CMZD permits single family homes by right and also lies within the overlay Floodplain Zoning District (the "Floodplain"), which consists of the flood fringe and the floodway.

The Township, its Board of Supervisors, its Zoning Hearing Board ("ZHB") members and its Solicitors (collectively the "Township") claim that long before Levin purchased the Property he knew that it was located within

the floodplain and, therefore, he would have to obtain a variance to build in the floodplain. The Township also claims that before he purchased the Property, Levin learned that the prior owner had applied for a variance to construct a single-family residence on the Property several years earlier and that the variance had been denied. Yet, notwithstanding this knowledge (or perhaps because of it), Levin purchased the Property at a substantial discount.

Levin says that before he purchased the Property, he met with Township Code Enforcement Officer David Kuhns on at least two occasions and was told there was no official policy in the Township that precluded Levin from building his home. According to Levin, the only requirement was compliance with § 905 of the Township Zoning Ordinance and other applicable sections of the Zoning Ordinance. Levin claims that he purchased the Property relying on Kuhn's representations.

For its part, the Township asserts that the Property is governed by both the provisions of the JMZO, the local zoning ordinance which applies in the Township as well as several other neighboring townships, and the Municipalities Planning Code, the Pennsylvania statute governing the land use process. The JMZO not only addresses the criteria for the CMZD in which the Property lies, but it also contains a Floodplain District Overlay – § 905 – which applies to every property located in a floodplain, including Levin's, and contains additional criteria which must be met in addition to the requirements of other normal zoning districts.

The purpose of § 905 is "to prevent the loss of property and life, the creation of health and safety hazards, the disruption of commercial and government services, the

extraordinary and unnecessary expenditure of public funds for flood protection and relief, and the impairment of the tax base." JMZO § 905(I)(A). The Township claims, contrary to Levin's assertion, that new residential construction is not permitted as of right or by special exception under § 905. Rather, it is incumbent upon an applicant to request and obtain a variance. Section 905 itemizes a number of considerations the ZHB must consider when deciding whether to grant a variance application for construction in the floodplain. Among the many considerations outlined are the following:

- The danger to life and property due to increased flood heights or velocities caused by encroachments. No special exception or variance shall be granted for any proposed use, activity, or development that will cause any increase in the one hundred (100) year flood levels in the Floodplain District as delineated in the Flood Insurance Study referenced in Section 905.III.A.I.

- The safety of access to the property by ordinary and emergency vehicles in time of flood.

JMZO § 905(IV)(E)(1)(a) and (j).

In addition to the criteria for obtaining a variance set forth in § 905, the JMZO also requires that "variances shall be in accordance with the provisions of the Pennsylvania Municipalities Planning Code ("MPC")." JMZO § 1507(D). In deciding whether to grant a variance, § 10910.1 of the MPC provides:

> The board may grant a variance, provided that all of the following findings are made where relevant in a given case:

> (1) That there are unique physical circumstances or conditions . . . peculiar to the particular property . . .
>
> (2) That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance . . .
>
> (3) That such unnecessary hardship has not been created by the appellant.
>
> (4) That the variance, if authorized . . . [would not] be detrimental to the public welfare.
>
> (5) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

53 P.S. § 10910.2. The Township contends these requirements are mandated by state law and the JMZO. According to the Township, applicants such as Levin who seek to build new construction in the floodplain must meet three different sets of requirements: (1) the criteria set forth in their specific Zoning District (for Levin, the requirements of CMZD); (2) the criteria contained in the § 905, the floodplain overlay; and (3) the five-pronged test set forth in § 10910.2 of the MPC and incorporated into the JMZO.

On November 24, 1997, Levin submitted an application for a zoning variance which included a request for a hearing before the ZHB to obtain a variance to construct a single-family detached dwelling within the 100-year floodway fringe of the Delaware River (the "Application"). Levin claims that the lot he wanted to build on lies within the flood fringe, which is located outside of the floodway, the area that carries the large bulk of any 100-year floodwaters.

The Application contained materials prepared by his engineer, among which was a HEC-II study required by § 905 of the JMZO. According to Levin, the HEC-II study measures whether a proposed structure improvement would cause a rise in the 100-year flood and whether the proposed structure causes backwater on the upstream of the property or a significant increase in the velocity of the river. Levin says that along with his Application, he submitted an existing features plan which identified by size and species all trees located on his property and a plan identifying the proposed location of the home, the proposed location for an on-site sanitary system, the on-site well and the suggested driveway location, as well as actual tests of the soil for percolation and the results of water drawn from a test well that had been drilled to conform to the requirements of § 905.

Upon receiving Levin's Application, Township staff placed it on the agenda for the December 17, 1997, public meeting of the Board of Supervisors for discussion and comment, as they do with every variance application. At the meeting, Stephen Harris on behalf of the Township Solicitor, Harris & Harris, advised the Supervisors that Levin had submitted an Application that requested a variance to construct a single-family home in the flood-plain. After Harris provided a brief description of the property and the specific variance sought by Levin, Harris inquired into whether the Supervisors wanted to authorize the Township Solicitor to attend the ZHB meetings and oppose the Application on behalf of the Township. A public discussion was held, members of the public made comments, and a motion was ultimately made to authorize the Solicitor to represent the Board of Supervisors in opposing Levin's Application. The motion carried and the Solicitor

was directed to oppose the Application on behalf of the Township. The Supervisors did not approve or deny the variance request itself, as that is left exclusively to the ZHB.

Levin claims that the December 17, 1997 meeting of the Supervisors was the first time many of the five Supervisors actually saw the Application and none of them claimed to have previously read or considered it. Levin alleges that he was not given notice that his Application would be considered by the Supervisors and that neither he nor his attorney were aware of the meeting so as to be able to present and discuss the Application to the Supervisors. Levin claims the Board's minutes are silent as to any concerns for the public health, safety and welfare of the community due to the Application. He also claims there is no evidence that the Supervisors considered the merits of the application in any respect before voting to oppose it. He further alleges that the minutes do not reflect that the Township Engineer had reviewed the Application as required by § 905. In fact, Levin claims that Township Manager Richard Gestrich confirmed that the Supervisors did not have a report from the Township Engineer at the December 17, 1997 meeting.

According to Levin, on January 20, 1998, Township Engineer Williams, as required by § 905, submitted his findings to the Supervisors stating that the Application was in order and that the required HEC-II study was satisfactory in all respects. Levin also claims that Williams testified that Levin's engineer went beyond the zoning ordinance requirements and included an additional HEC-II study based upon the then unadopted model of the Delaware River floodplain by the U.S. Army Corp of Engineers. Moreover, Levin alleges that Williams testified

that the HEC-II study prepared by Levin's engineer was the most complete and thorough analysis of any application that he had reviewed.

Even though the Supervisors had previously authorized the Solicitor to oppose Levin's Application, the issue was raised again the following month inasmuch as the make-up of the Board had changed at the end of 1996 and the ZHB hearings on Levin's Application had not yet begun. The newly-elected Supervisors held two of the five seats on the Board as of January 5, 1998. After comment and discussion at the January 21, 1998 public meeting, the now-different slate of Supervisors again voted to authorize the Solicitor to represent the Township in opposition to Levin's Application. The Township claims that this was the final direct involvement of the Supervisors in Levin's variance request until the ZHB issued its decision.

The Township claims that even if the Supervisors had not authorized the Solicitor to oppose Levin's Application, and instead had taken no position or had sent the Solicitor to support it, the Application would still be decided by the ZHB based on whether the ZHB concluded that Levin had satisfied the requirements of the Township ordinances, the five-pronged criteria set forth in the MPC, and the JMZO criteria regarding issuance of a variance.

The ZHB held eight evidentiary hearings. During the hearings, Levin put on evidence that he had satisfied all of the relevant portions of § 905 of the JMZO. The Township put on evidence to the contrary, focusing on the inaccessibility of the Property by emergency vehicles (a § 905 factor) and that Levin had not met the five-pronged variance test (§ 10910.2 of the MPC, which is incorporated into the JMZO). The evidence presented to the ZHB

centered primarily around two of the five statutory variance criteria: (1) alternative uses of the Property and (2) the public health, safety and welfare. With respect to the former, the parties offered conflicting testimony regarding whether Levin's Property could be used by Levin for alternative uses other than the new construction of a single-family residence.

Both parties presented evidence with respect to the issue of health, safety and welfare. The Township contended that the proposed use constituted a safety hazard for Levin, the Township and other rescue personnel, and citizens in general. Along these lines, testimony was presented that portions of Levin's Property had been underwater during floods which occurred over the past ten years and beyond and that during such floods ingress and egress to the Property was impossible, thereby presenting a danger to Levin, his family and guests, and rescue personnel, as well as future occupants of the dwelling who might be unaware of the danger. Indeed, claims the Township, several years before, a woman had been killed during a flood on the road that bisects Levin's Property when that road was underwater during a flood. In addition, although Levin presented evidence that construction of his residence would not alter the 100-year flood level by any noticeable percentage, the Township presented evidence that the cumulative effect of building in the floodplain would result in a rise of the floodplain and would also have a corresponding effect on floodwater velocity. Other safety concerns such as displaced sewage and the like were also raised.

Levin disputed this evidence by presenting testimony of remedial measures he intended to take which he believed would alleviate the health, safety and welfare

concerns raised by the Township. Levin offered to make installation of these measures a contingency of any variance. However, the Townships claims that Levin now says he will not install these safety features.

At a public hearing on July 30, 1998, the ZHB voted 3 to 0 to deny Levin's Application, and on August 13, 1998, the ZHB issued a written opinion containing its Findings of Fact and Conclusions of Law.

After the ZHB denied Levin's Application, he filed a Land Use Appeal in the Court of Common Pleas of Bucks County on September 9, 1998. The Township filed a Notice of Intervention in the Court of Common Pleas opposing the appeal. On October 7, 1998, at a public meeting, the Board of Supervisors voted in favor of a motion to authorize the Solicitor to represent the Township in the appeal.

On February 23, 1999, Judge John J. Rufe of the Court of Common Pleas issued his initial Memorandum Opinion and Order reversing the ZHB's decision. On March 3, 1999, the Board of Supervisors authorized the Solicitor to file that decision to the Commonwealth Court. Consequently, on May 7, 1999, Judge Rufe issued a Supplemental Opinion. On May 11, 2000, the Commonwealth Court affirmed the Court of Common Pleas' decision.

The Board of Supervisors was presented with the Commonwealth Court's opinion and, on June 7, 2000, passed a unanimous motion authorizing the Solicitor to file petition for allowance of appeal with the Pennsylvania Supreme Court. On June 12, 2000, the petition for allowance of appeal was filed; however, on November 9, 2000, the Pennsylvania Supreme Court denied it without opinion.

Although it has nothing to do with the resolution of this appeal, the Township claims that Levin has obtained his variance but has yet to begin building his home despite having received all of the necessary permits and approvals. However, Levin says that he has taken steps to start construction by clearing the land, putting in a road and grading the area of the house to bring it up to the required elevation.

## II. DISTRICT COURT PROCEEDINGS

On October 26, 1999, Levin filed a complaint in the district against the Township, the members of the Board of Supervisors in their individual and official capacities, the members of the Zoning Hearing Board in their individual and official capacities, and the Township's Solicitors, in their individual and official capacities. He thereafter filed an amended complaint alleging violations of his substantive and procedural due process rights pursuant to § 1983; conspiracy in violation of § 1983; and state law claims of civil conspiracy, abuse of process and wrongful use of civil process. On October 4, 2000, the Township defendants filed a motion to dismiss the amended complaint and on May 10, 2001, the district court entered an order granting in part and denying in part the motion to dismiss. As a result, the remaining claims were: (1) substantive due process violations pursuant to § 1983 against the Township, the Board of Supervisors, the ZHB and the Solicitors; (2) civil conspiracy against the Township, the Board of Supervisors, the ZHB and the Solicitors; and (3) abuse of process against the Township, the Board of Supervisors and the Solicitors.

Defendants then filed a motion for summary judgment, asserting, *inter alia,* the defense of qualified immunity. On February 25, 2003, the district court entered a memorandum and order granting summary judgment to the defendants on Levin's remaining § 1983 substantive due process claim and his state law claims.

Levin then filed a timely appeal.

## III. DISCUSSION

Levin argues that the district court erred by granting summary judgment to the defendants on his § 1983 substantive due process claim and his state civil conspiracy and abuse of process claims. Each argument is considered separately below.

### A. Substantive Due Process.

The due process clause of the Fourteenth Amendment guarantees "more than fair process" and "cover[s] a substantive sphere as well, barring certain government actions regardless of the fairness of the procedures used to implement them." *County of Sacramento v. Lewis,* 523 U.S. 833, 840 (1998) (citations and internal quotation omitted). That substantive component is intended to prevent government officials from abusing their power or employing it as an instrument of oppression. *Id.* (citation and internal quotations omitted).

Substantive due process violations are actionable under § 1983. *Zinermon v. Burch,* 494 U.S. 113, 125 (1990). "To prevail on a non-legislative substantive due

process claim, a plaintiff must establish as a threshold matter that he has a protected property interest[1] to which the Fourteenth Amendment's due process protection applies." *Woodwind Estates, Ltd. v. Gretkowski,* 205 F.3d 118, 123 (3d Cir. 2000), *abrogated on other grounds, United Artists Theatre Circuit, Inc. v. Township of Warrington,* 316 F.3d 133 (3d Cir. 2003). We have held that "ownership is a property interest worthy of substantive due process protection." *DiBlasio v. Zoning Board of Adjustment for the Township of West Amwell,* 53 F.3d 592, 600 (3d Cir. 1995), *abrogated on other grounds, United Artists Theatre Circuit, Inc. v. Township of Warrington,* 316 F.3d 133 (3d Cir. 2003). "Indeed, one would be hard-pressed to find a property interest more worthy of substantive due process protection than ownership." *Id.* at 601.

Thus, it [is] clear that Levin's ownership of the Property is a property interest that is entitled to substantive due process protection. Levin alleges in his § 1983 action that the Township's conduct in opposing his application for a variance violated his substantive due process property rights. However, the Township moved for summary judgment on Levin's substantive due process claim on the basis of, *inter alia,* qualified immunity.

Qualified immunity generally protects government officials performing discretionary functions from civil damages. *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Qualified immunity applies so long as the government officials' "conduct [did] not violate clearly established

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[1] Levin does not contend here that the Township officials violated a protected liberty interest.

statutory or constitutional rights of which a reasonable person would have known." *Id.* In determining whether qualified immunity applies, a court asks: (1) whether the plaintiff has alleged the deprivation of a constitutional right, and if so, (2) whether the right was clearly established at the time of the alleged violation. *Saucier v. Katz,* 533 U.S. 194, 200 (2001). A right is clearly established if "its outlines are sufficiently clear that a reasonable officer would understand that his actions would violate the right." *Sterling v. Borough of Millersville,* 232 F.3d 190, 193 (3d Cir. 2000). Therefore, the court's task "'is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all,' before reaching the question of whether the right was clearly established at the time." *Johnson v. Newburgh Enlarged School District,* 239 F.3d 246, 251 (2d Cir. 2001) (quoting *County of Sacramento v. Lewis,* 523 U.S. at 841 n. 5).

Prior to January 14, 2003, we took the position that executive action in a land use case violates substantive due process if it was made with any "improper motive." *See Bello v. Walker,* 840 F.2d 1140 (3d Cir. 1998). However, on January 14, 2003, we adopted a new, more stringent standard to be applied to substantive due process claims. In *United Artists Theatre Circuit, Inc. v. Township of Warrington,* 316 F.3d 392 (3d Cir. 2003), *petition for reh'g en banc denied,* 324 F.3d 133 (3d Cir. 2003), which was itself a land use dispute case, we held that the standard to be applied in all cases involving a substantive due process claim is whether the government executive's actions "shock the conscience," and this rule extends to cases

arising in the land use context.[2] We were of the opinion that the "improper motive" substantive due process cases were in direct conflict with the Court's decision in *County of Sacramento v. Lewis,* 523 U.S. 833 (1998).

In *Lewis,* the Court explained the standard that applies when a plaintiff alleges that action taken by an executive official violates substantive due process.[3] The "core of the concept" of due process is "protection against arbitrary action" and "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." 523 U.S. at 845-46 (citation omitted). Consequently, "the cognizable level of executive abuse of power [is] that which shocks the conscience." *Id.* at 846. "[I]n a due process challenge to executive action, the threshold

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[2] Levin argues that the "shocks the conscience" test only applies where the state executive actor had to act with urgency. Levin's Br. at 25-26, 33; Reply Br. at 7. But, says Levin, because the Township did not have to act, and did not in fact act, with any urgency, the "shocks the conscience" test does not apply to his substantive due process claim. Consequently, the less-stringent *Bello* "improper motive" test applies.

However, there's nothing in *United Artist* that supports the distinction Levin urges upon us. In fact, *United Artist* makes it clear that the "shocks the conscience" test applies to *all* substantive due process claims.

Levin also "takes issue" with the *United Artist* decision, claiming that it does not afford an individual any "protection from the irrational and arbitrary actions of the government and its officials." Reply Br. at 6. However, *United Artist* is the law of this circuit and, therefore, his distaste for it is irrelevant. Moreover, the *United Artist* "shocks the conscience standard" is precisely designed to protect an individual from arbitrary and irrational executive action.

[3] The issue in *Lewis* was "whether a police officer violates the Fourteenth Amendment's guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender." 523 U.S. at 836.

question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience. . . . Only if the necessary condition of egregious behavior were satisfied would there be a possibility of recognizing a substantive due process right to be free of such executive action." *Id.* at 847 n.8.

Although "the measure of what is conscience-shocking is not a calibrated yard stick, it does . . . point the way." *Id.* at 847 (citation, internal quotations and brackets omitted). Yet, "deliberate indifference that shocks in one environment may not be so patently egregious in another." *Id.* at 850. The shocks the conscience "test can be used to mark the beginning point in asking whether or not the objective character of certain conduct is consistent with our traditions, precedents, and historical understanding of the Constitution and its meaning." *Id.* at 857 (Kennedy, J., concurring) (citing *Collins v. Harker Heights,* 503 U.S. 115, 126-28 (1992)).

Levin argues that the district court erred by granting summary judgment to the Township on his substantive due process claim because there is a genuine issue of material fact as to whether the Township's actions shock the conscience and, therefore, constituted a substantive due process violation However, Levin misunderstands the nature of the inquiry in a case where the state executive officer invokes the defense of qualified immunity. That inquiry is stated on our decision in *Wilson v. Russo,* 212 F.3d 781 (3d Cir. 2000):

> The qualified immunity defense requires that we engage in a two-step analysis. First, we must determine whether the plaintiff has alleged the deprivation of a constitutional right at all.

> Only if he has should we proceed to determine whether that right was clearly established at the time of the alleged violation. Summary judgment is appropriate if no reasonable juror could conclude that [plaintiff's] clearly established rights were violated.
>
> *This does not mean that the jury determines the contours of the right. Rather, after making a legal determination about the existence of a right, and whether it is clearly established, we determine whether the facts on the record are such that a jury could conclude that the clearly established right was violated.* As a methodological matter, we commonly work backwards: We arrange the facts in the light most favorable to the plaintiff, and then determine whether, given precedent, those "facts," if true, would constitute a deprivation of a right. And then, if necessary, we determine if the right is clearly established.

212 F.3d at 786 (citations omitted) (emphasis added).

Given the nature of the qualified immunity inquiry, it is necessary for us to look at the facts in the light most favorable to Levin to determine if the Township's actions so shock the conscience that a substantive due process violation occurred. Levin points to a number of instances of Township conduct which he contends "shock the conscience." Each is noted separately below.

**(i). Kuhns's representations to Levin.**

Levin alleges that on at least two occasions he met with Code Enforcement Officer Kuhns prior to buying the Property and that Kuhns told him that there was no official or unofficial Township policy that precluded Levin

from building his home on the Property. Rather, says Levin, Kuhns told him that the only requirement was compliance with § 905 of the JMZO and other applicable zoning ordinances, regulations and statutes. Therefore, says Levin, relying on Kuhns's representations, he bought the Property.

However, we completely fail to understand how this shocks the conscience. Kuhns's representations to Levin were correct. Kuhns told Levin that in order to build on the Property, Levin would have to get a variance. Levin intimates that Kuhns lied to him because there was a Township policy in place to prevent anyone from ever building on the floodplain. That issue is discussed below.

**(ii). Official Policy to Prohibit Construction on the Floodplain.**

Levin claims that the Township's conduct shocks the conscience because there was a Township[4] policy in place to prevent anyone from ever building in the floodplain and, therefore, the variance application procedure was an sham exercise. However it appears uncontested that the Board of Supervisors had formed the opinion that construction on the floodplain should not be allowed for public safety reasons. For example, in his deposition, Supervisor Baldwin relied on his personal experience to make a determination that Levin's proposed residence would pose a danger to health, safety and welfare. In Baldwin's view, it was unwise to build a single family residence in an area

[4] As noted, the "Township" consists of all of the defendants, viz., the Board of Supervisors and its members, the Zoning Hearing Board and its members, and the Township's Solicitors.

that flooded and, therefore, posed a safety threat to the homeowner and his family. Supervisor Ford testified to similar concerns, and, in addition, focused on the safety of rescue personnel who could be called upon to rescue floodplain homeowners in times of flooding. Supervisor Ford testified that he had personal experience with the Property and had witnessed police and fire personnel rescue neighboring landowners in a 1996 flood. Ford also testified that he was present on River Road, the road that bisects the Property, when a woman drowned there in a flood. Finally, the Board members were concerned with problems associated with surrounding water and sewer systems in times of a flood. Supervisor Ford testified that he witnessed sewage floating in flood waters when the canal went over its banks in a neighboring town in New Jersey.

These are obviously legitimate concerns, and we fail to understand how the Board's opposition to having any construction in the Floodplain shocks the conscience. In fact, on this record, the township's acquiescence to such building would have been shocking. Moreover, even if the Board had formed the opinion that no construction should ever take place on the floodplain, the Board of Supervisors does not make the determination as to whether a variance should be granted. That is the function of the Zoning Hearing Board. Levin does not claim that the ZHB rubber-stamps what the Board has decided.

### (iii). Board's Voting to Oppose Levin's Application.

Levin claims that it shocks the conscience that the Board of Supervisors voted to send the Solicitor to oppose

Levin's application without even reviewing it and without having even first read the application. However, given the Board's safety and public health concerns, we believe that the Board members would have been derelict in their duty had they not voted to oppose Levin's application.

Interestingly, we note that the Township submitted an expert report prepared by Gilbert P. High, Jr., who the Township claims is an experienced land use attorney in the Philadelphia area. High opined: (1) that it was obligatory for the Board to review matters brought before the ZHB in order to determine whether the Board should take a position with respect to a particular application; (2) the Board's public safety concerns are reason enough to send the Solicitor to the ZHB hearing; and (3) the Board's action in authorizing the Solicitor to oppose Levin's application was reasonable and for a legitimate government purpose. High concluded by saying that it is the Board's job to look after the public welfare and to challenge those whose development it believes pose a threat to the public safety. Therefore, opined High, the Board acted well within the proper scope of its legitimate authority. Significantly, Levin offered no expert report, or anything else, to attempt to counter High's expert opinion.

**(iv). Conduct of ZHB Members.**

Levin claims that certain conduct of ZHB members shocks the conscience. First, he alleges that during the zoning hearings, *ex parte* communications occurred between ZHB member Gorring, who was appointed by the Board of Supervisors to the ZHB prior to the second zoning hearing, and some of the intervening neighbors. Second, Levin alleges that during the course of the zoning hearing,

the ZHB received an *ex parte* memo from Code Enforcement Officer Kuhns, dated February 25, 1998. Levin claims that the memo includes an attached critique of Levin's HEC-II study by Calvin Larson, an engineer who lives in the Township. Levin also claims that the critique of Levin's HEC-II study is set forth in a February 22, 1998, e-mail from Larson to the Township's Environmental Advisory Committee ("EAC") Chairman, Stanley Arabis.[5] Levin alleges that no copy of the critique was given to him or to his attorney. He also claims that it was not until the March 31, 1998 zoning hearing, when ZHB Chairwoman Hirst referred to the critique, that Levin or his attorney became aware of Larson's critique. And, says Levin, it was not until April 19, 1998 that the Township engineer faxed a copy of Larson's critique, which was redacted to omit Larson's name, the February 22, 1998 date of the e-mail and the fact that the e-mail was from Larson to Arabis. Moreover, says Levin, neither Larson nor Arabis testified at any of the hearings and the critique was never entered into the ZHB's record.

However, the evidence of record does not support Levin's allegations. Levin alleged that a man named Washburn was privy to the *ex parte* communications between Gorring and intervening neighbors. However, Washburn testified in his deposition that he did not hear any conversation between Gorring and the intervening landowners, Lamm and Kovacevich. Washburn only testified that he saw, but did not hear, Gorring talk to an intervening landowner named Devlin. Moreover, we

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[5] Levin says that Larson testified that Arabis asked that Larson review Levin's application. However, Levin says that Arabis denied ever making such a request.

cannot help but note that while Levin alleges *ex parte* communications occurred, and suggests that those *ex parte* communications were somehow improper, he never bothers to inform us of the content of the alleged *ex parte* communications.

With regard to the Larson critique, the Township concedes that at some point during the application process, Larson submitted comments to Williams, the Township engineer, about Levin's application. However, Williams testified that he reviewed Larson's comments and forwarded them to Levin's engineer for comment. Levin, while trying to make much of his claim that neither he nor his attorney saw Larson's critique, does not dispute testimony that Williams mailed the critique to Levin's engineer. Moreover, because Larson's comments were forwarded to Levin's engineer, they cannot be *ex parte*. In addition, the Township claims that the ZHB was provided with Larson's e-mail to Arabis and that was stated on the record at the March 31, 1998 hearing. The Township, claims that Levin's lawyer was present, but made no objection. Significantly, Levin fails to mention this rather critical fact.

In addition, the Township says that other evidence, neither mentioned nor rebutted by Levin, shows that the ZHB members acted properly.

- ZHB member Fisher testified at deposition that he had not heard anything about Levin's application before the first night of the hearings, nor did he talk to any of the Supervisors or the Solicitors before the hearings began. He did not speak to Kuhns before the first night of the hearings and has no knowledge of any ZHB member speaking to the

Supervisors or Solicitors before the hearings began. He never spoke to any of the neighbors about the application at anytime other than during the hearings. Similarly, he has no knowledge that any ZHB member spoke to any neighbors.

- ZHB member Hirst testified that she was not aware of any *ex parte* communications concerning Levin's application. She testified that she did not have any discussion with anyone from the Township outside of the hearing room during the hearings. She testified that she was concerned about the safety of rescue personnel having to go to rescue people living in the proposed household.

- ZHB member Gorring testified that once he was appointed, he did not have any discussions with anyone concerning any matter that was pending before the ZHB, including Levin's application.

In sum, Levin's claim that the conduct of the members of the ZHB shocks the conscience has not a shred of record support.

**(v). Delay in Issuing Permits.**

Levin contends that the delay in issuing permits demonstrates conscience-shocking conduct on the part of the Township. He recounts the delay as follows. Not unexpectedly, the Township says that none of the alleged "delay" constitutes conscience-shocking conduct. At the outset, the Township claims that Levin's allegations of delay are mere allegations and that he has not produced any evidence to support them. More importantly, according

to the Township, in May 2000, Levin applied only for a foundation permit, although he believed that he paid the fee for both the foundation permit and the building permit because the fees could not be broken apart. The Township admits that the issuance of the foundation permit was stayed pending the appeal process on the advice of the Solicitor. According to the Township, the foundation permit was further delayed because Levin did not submit the necessary documents. However, the Township claims that once Levin submitted the necessary documents, the foundation permit was approved.

In addition, the Township claims that when his counsel requested a building permit in January 2002, Levin was presented with a list of items he must first submit before obtaining the permit. A dispute then arose as to whether Levin had paid the appropriate fee. The Township alleges that Levin claimed that he paid the building permit fee back in 2000 when he applied for the foundation permit, but that Kuhns's cover letter indicates that the fee was only for a foundation permit. The Township claims that Levin produced no evidence contradicting Kuhns's cover letter saying that the fee previously paid was for the foundation permit only. In any event, says the Township, the building permit was issued one week later on February 5, 2002, immediately after Levin paid the building permit fee and the remaining conditions were met.

It is obvious that the parties to this dispute tell completely different stories about the cause of the claimed delay in issuing Levin's permits. However, the dispute does not rise to a genuine issue of material fact because, even accepting Levin's version as true, we do not see any conduct in the permit-issuing process that shocks the

conscience. At most, Levin tells a tale of overbearing conduct by a Township employee. That overbearing conduct is neither so egregious, nor so outrageous, that it shocks the contemporary conscience. We remind Levin that among the "slings and arrows of outrageous fortune," Hamlet included "[t]he insolence of office," and "the law's delay." WILLIAM SHAKESPEARE, HAMLET, act 3, sc. 1.

We also fail to understand how the Open Space Plan and the proposed Canal Setback Ordinance constitute conscience-shocking behavior. Both the Plan and the proposed Ordinance are legitimate areas of governmental concern. Moreover, Levin's Property was never taken for Open Space and the Canal Setback Ordinance was never adopted. Therefore, neither the Open Space Plan nor the proposed Canal Setback Ordinance impinged on any protected property interest Levin has in the Property.

To sum up, there is no conduct by the Township that shocks the conscience. Therefore, Levin was not deprived of any substantive due process right and it is not necessary for us to go to the second step of the qualified immunity inquiry to determine if the alleged right was clearly established at the time of the alleged violation. The district court's grant of summary judgment to the Township on Levin's substantive due process claim was proper.

**B. Abuse of Process.**

Levin asserted a state-law abuse of process claim against the Township, the Board of Supervisors and the Solicitors. Under Pennsylvania law:

> The tort of abuse of process is defined as the use of legal process against another primarily to accomplish a purpose for which it is not designed.

> To establish a claim for abuse of process it must be shown that the defendant (1) used a legal process against the plaintiff, (2) primarily to accomplish a purpose for which the process was not designed; and (3) harm has been caused to the plaintiff. This tort differs from that of wrongful use of civil proceedings in that, in the former, the existence of probable cause to employ the particular process for its intended use is immaterial. The gravamen of abuse of process is the perversion of the particular legal process for a purpose of benefit to the defendant, which is not an authorized goal of the procedure. In support of this claim, [a plaintiff] must show some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.

*Shiner v. Moriarty,* 706 A.2d 1228, 1236 (Pa.Super. 1998) (citations, internal quotations and ellipses omitted).

Levin contends that the legal process abused is the state appeals process. He claims that Board of Supervisors authorized the Solicitors to intervene in his appeal of the ZHB's decision to the Court of Common Pleas, that the Board authorized the Solicitors to appeal the Court of Common Pleas decision to the Commonwealth Court, and that the Board authorized the Solicitors to file a petition for allowance of appeal with the Pennsylvania Supreme Court, "to accomplish a purpose for which the appeals process was not designed, namely to harass Levin and cause him financial and emotional injury and force him to

abandon his attempts to build his home."[6] Levin's Br. at 36. In making that contention, he merely cites to a number of pages in the appendix, but does not begin to tell us what those citations might reveal. Therefore, we question how serious Levin is about his abuse of process claim.

However, if one takes the trouble to read the portions of the record Levin cites to, but does not recite, one quickly concludes that the record clearly shows that the members of the Board of Supervisors were not improperly singling out Levin or using the legal process to harass him. Rather, they simply believed that there were public safety issues involved with new construction in the floodplain and that the zoning ordinance providing that there should not be construction in the flood plain was reasonable. For example, in his deposition Board member Falconi testified:

> Q: Okay. Did you consult with Mr. Williams at all before making your vote in favor of seeking review by the Pennsylvania Supreme Court?
>
> A: No.

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[6] Levin also says that the alleged delay in issuing the permits constitutes abuse of process. Under Pennsylvania law, "[t]he word 'process' as used in the tort of abuse of process has been interpreted broadly, and encompasses the entire range of procedures incident to the litigation process." *Shiner,* 706 A.2d at 1237. However, the majority of the alleged delay occurred after the state court appeal process had ended. Therefore, the delay cannot, even in the most liberal sense, be an "incident" to the legal process. More importantly, in *Shiner,* the things that were found "incident" to the legal process were all of the motions and petitions filed, not just a form of coercive legal process such as a subpoena or a writ employed for an improper purpose. Therefore, even the alleged delay that did occur before the state appeals process ended cannot be incident to the litigation. The alleged delay is not legal process.

> Q: Is there any reason why?
>
> A: Why I didn't consult with him?
>
> Q: Right.
>
> A: No. I had a belief that our ordinance was reasonable and that the State Supreme Court should determine whether our ordinance was reasonable, which is an ordinance saying that there should be no new residences in the flood plain.
>
> Q: Is that your understanding –
>
> A: I thought that was a reasonable ordinance and that's – I didn't feel any need to do further investigation. It just made sense to me, so, I thin[k] that was the principle that was being tested.

App. at 5583-84. As another example, Board member Welsh testified that he voted to authorize the Solicitor's opposition to Levin's application before the ZHB because of Welsh's concerns about public health issues. When asked whether he relied on the Solicitor's advice in voting to oppose the application, Welsh testified:

> I think it was the description of the general conditions of the site as Steve outlined them and the feeling on the part of the supervisors that if we didn't object to this one, you know, we're saying, okay, you can just do it everywhere. You have to be somewhat consistent, I mean, and one of the issues that's involved here is what happens when all of those septic systems flood and these things. I mean, there are major issues that aren't just the level of the site as it sits right there.

App. at 3549.

Given these legitimate concerns, we conclude that Levin's abuse of process claim is without merit and the district court's grant of summary judgment to the Township on that claim was proper.

### C. Civil Conspiracy.

Levin alleged a state-law civil conspiracy claim against the Township, the Board of Supervisors, the Zoning Hearing Board and the Solicitors. "In Pennsylvania, to state a cause of action for civil conspiracy, the following elements are required: (1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; (2) an overt act done in pursuance of the common purpose; and (3) actual legal damage." *General Refractories v. Fireman's Fund Ins. Co.*, 337 F.3d 297, 313 (3d Cir. 2003) (citation and internal quotations omitted). Moreover,

> the established rule is that a cause of action for civil conspiracy requires a separate underlying tort as a predicate for liability. Thus, one cannot sue a group of defendants for conspiring to engage in conduct that would not be actionable against an individual defendant. Instead, actionable civil conspiracy must be based on an existing independent wrong or tort that would constitute a valid cause of action if committed by one actor.

*In re: Orthopedic Bone Screw Prods. Liab. Litig.*, 193 F.3d 781, 789 (3d Cir. 1999) (citations and internal quotations omitted).

We are hard-pressed to understand Levin's civil conspiracy claim. He alludes to the abuse of process claim and the alleged delays in issuing permits, but then shifts to a discussion of the Township's Open Space Plan. Thus, we suppose that he is arguing that there was a conspiracy involving all of the Township defendants to preserve his Property as open space in the Open Space Plan. His argument is as follows:

> The abuse of appeals process and permitting process were instituted in a deliberate attempt at all costs by the Township to preserve open space in the Township, specifically to preserve Levin's property as open space. Shortly before Levin purchased his Property and submitted his application for variance, a $5.9 million bond issue to preserve open space was approved. The Township EAC drafted a plan to preserve Upper Makefield Township's farmland and open space at the same time Levin appeared before the Zoning Hearing Board. The Plan was approved while Levin's application was pending. The Township's Open Space Plan identifies Levin's Property as potentially being part of the Plan. The Open Space Plan also advocates that the Township protect open space within the Township through "non-acquisition based methods." Board Supervisors demonstrated how the Township has used non-acquisition based methods to preserve open space. The Township engaged in a course of action that it thought would "wear-down" Levin to the point that he would be willing to talk with the Township about selling tne Property to the Township and/or that he would abandon his attempts to construct his proposed home.

Levin's Br. at 38-39. All of this "evidence," says Levin, presents a genuine issue of material fact and therefore

precludes the grant of summary judgment in favor of the Township. However, Levin's argument is pure conjecture.

It is undisputed that the Open Space Plan was not adopted until six months after the Board of Supervisors decided to oppose Levin's request for a variance. Moreover, the Environmental Advisory Committee, which drew-up and developed the Plan, is an advisory counsel to the Board of Supervisors. Its actions are not Township policy unless and until those actions are adopted by the Board of Supervisors. Significantly, Levin has not produced any evidence that the Board decided to adopt the Open Space Plan in an effort to thwart Levin's attempt to build his house divorced from proper consideration of safety. And, Levin has produced no evidence that there is a link between the Board's decision to oppose Levin's variance request and its decision to adopt the Open Space Plan.

Further, the Open Space Plan does not identify Levin's Property as part of the Plan. Certain sections of the Plan do identify "those natural resources deserving of protection," but Levin's Property, consisting of two separate tax parcels, is not identified among those natural resources. Levin claims that the following language from the Plan targets his Property:

> As another outgrowth of the work done on part of the Plan, Upper Makefield Township is reviewing the possibility of undertaking a program to acquire or permanently protect the many tiny lots of land located between River Road and the Delaware River. It is felt that there riparian buffer properties play an important role in maintaining the ecosystem of the riverfront as well as ensuring at leas[t] the visual access to river along the highly traveled river road corridor.

App. at 3107. However, Levin's Property is not referenced by name or tax parcel in this paragraph. Moreover, the Plan talks about pieces of property located between River Road and the Delaware River. Only a portion of Levin's Property is between River Road and the Delaware River. The remainder of the Property is on the other side of River Road and his proposed construction was on that side of River Road. At most, only a portion of Levin's Property may have been subject to the Open Space Plan. The portion on which he wants to build is not.

In addition, the $5.9 million bond issue to preserve open space was the subject of a voter referendum that received voter approval. Therefore, the bond issue can not be used as evidence of a conspiracy among the Township officials given that it was action taken by a majority of the Township's voters. Finally, Levin's Property was never taken by the Township for open space.

In sum, Levin's allegation that there was a civil conspiracy whose underlying tort was the institution of the Open Space Plan is meritless.

**IV.**

Accordingly, when all is said and done, and all the dust has settled this suit appears to be little more than a resident's inability to understand why the Township might not think it prudent land use planning to allow someone to build a home in a flood plain. Accordingly, for all of the above reasons, we will affirm the district court.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No: 03-1860

BENNET LEVIN,

Appellant

v.

UPPER MAKEFIELD TOWNSHIP, BUCKS COUNTY, PENNSYLVANIA; ROSE MARIE SAUTER; CONRAD BALDWIN; WILLIAM GUNSER; EDWARD X FORD; JOHN TITTERTON; LAWRENCE SALTZMAN; JOHN WALSH; BARBARA HIRST; ROBERT GORRING; ERIC FISHER; MICHAEL FRANK; STEVEN HARRIS, ESQUIRE; GREGORY STURN, ESQUIRE; HARRIS & HARRIS, ATTORNEYS; JOHN DEVLIN; MARY DEVLIN; JONATHAN LAMM; MARY LAMM; THOMAS KOVACEVICH; MARY KOVACEVICH; DEBORAH DEVLIN; DONNA V. LAMM

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(Civ. No. 99-cv-05313)
District Judge: Hon. Legrome D. Davis

Submitted Pursuant to Third Circuit LAR 34.1(a)
February 12, 2004

BEFORE: SCIRICA, *Chief Judge*, and
ROTH and McKEE, *Circuit Judges*

JUDGMENT

(Filed March 8, 2004)

This cause came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on February 12, 2004.

On consideration whereof, it is now here ORDERED AND ADJUDGED by this Court that the judgment of the said District Court entered on February 27, 2003, be, and the same is hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron
Clerk

Dated: March 8, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| BENNETT LEVIN,<br>Plaintiff, | : | CIVIL ACTION |
| v. | : | NO. 99-CV-5313 |
| UPPER MAKEFIELD TOWNSHIP, et al.,<br>Defendants. | : | |

**MEMORANDUM AND ORDER**

Davis, J. February 25, 2003

**MEMORANDUM**

## I. FACTUAL BACKGROUND

In June 1997, Bennett Levin ("Plaintiff") contemplated purchasing approximately seven acres of unimproved land ("Property") in Upper Makefield Township ("Township") to construct a single-family dwelling. The Property is flanked by the Delaware River ("River") on one side, and the Delaware Division of the Pennsylvania Canal ("Canal") on the other, and zoned within the Conservation Management Zoning District ("CM") and the Floodplain Zoning District ("Floodplain"). After a preliminary investigation, Plaintiff discovered that a zoning variance was required from the Township before building on the Property, and the prior property owner, Marvin C. Soffen, applied for and was denied a zoning variance on the same property in 1992 (P. Resp., ex. 47 at p. 4). Shortly thereafter, Plaintiff purchased the Property from Mr. Soffen for $60,000 (P. Resp., ex. 55).

On November 24, 1997, Plaintiff submitted a zoning variance application ("Application"),[1] which included a request for a hearing before the Zoning Hearing Board ("ZHB").[2] On December 17, 1997, the Township held a public meeting, and the Supervisors made a motion authorizing the Solicitor to oppose Plaintiff's Application (P. Resp., ex. 53 at p. 4). Stephen Harris, through his law firm Harris & Harris, personified the Solicitor.

The December 17, 1997 meeting was the first time that many of the Supervisors actually saw Plaintiff's Application, and none claimed to have previously read it (P. Resp., ex. 19 at p. 96-97; ex. 22 at p. 12; ex. 24 at p. 8; ex. 27 at p. 24).[3] The motion by the Supervisors to authorize the Solicitor to represent the Township's interest in opposition to the Plaintiff's Application was carried (P. Resp., ex. 53 at p. 4).[4] The Supervisors' votes reflected

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[1] The Joint Municipal Zoning Ordinance ("JMZO"), Article IX, Exhibit B, specifically details the procedures for an applicant requesting a special exception or variance from the requirements of the "Floodplain District." Plaintiff's Application irrefragably complied with these procedures, while Mr. Soffen's did not (P. Resp., ex. 47 at p. 3, 536 A.2d 1337).

[2] The Township does not grant or deny variance applications – this is the ZHB's function. Rather, the Township, through the Board of Supervisors ("Supervisors"), reviews variance applications and decides whether to give the Township Solicitor ("Solicitor") authorization to represent the Township's position before the ZHB. The Township may be for or against a variance application, or take no stance at all, in which case the Solicitor is not endorsed to go before the ZHB on the Township's behalf. 53 Pa. Cons. Stat. Ann. § 10909.1.

[3] Plaintiff was not given notice of the December 17, 1997 meeting, and neither Plaintiff nor his representative attended (P. Resp., ex. 16 at p. 3).

[4] The composition of the Board of Supervisors changed on January 5, 1998, and two new members, Edward Ford and John Titterton, replaced two exiting members, Lawrence Saltzman and John Welsh.

(Continued on following page)

their individual concerns as to: (i) the safety of the inhabitants in Plaintiff's proposed home, and the safety of all subsequent purchasers (D. Motion, ex. 18 at p. 117-18); (ii) the safety of emergency personnel that might be required to rescue the inhabitants under parlous flood conditions (D. Motion, ex. 14 at p. 28-29, 58); and (iii) the environmental effect of potential sewage up-rise from the proposed on-site sewage system (D. Motion, ex. 18 at p. 157; ex. 19 at p. 107; ex. 14 at p. 58).

Thereafter, the ZHB held eight separate evidentiary hearings before rendering a decision on the Application.[5] At a public hearing on July 30, 1998, the ZHB held that Plaintiff's Application did not meet the requirements of the Municipalities Planning Code ("MPC"), and rejected the Application by a unanimous 3-0 vote (P. Resp., ex. 13 at p. 2-7).

On September 9, 1998, Plaintiff filed a land-use appeal with the Court of Common Pleas, Bucks County, Pennsylvania, and on October 7, 1998, the Supervisors voted in favor of authorizing Mr. Harris to represent the Township in the appeal before the Court of Common Pleas (D. Motion, ex. 42 at p. 10). On February 23, 1999, Common Pleas Judge John J. Rufe issued a Memorandum Opinion and Order reversing the ZHB and granting Plaintiff's Application for a zoning variance. *Bennett Levin*

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The new slate of Supervisors, Rosemarie Sauter, Conrad Baldwin, William Gunser, Edward Ford, and John Titterton, held another vote on the Plaintiff's Application on January 21, 1998, yielding the same result as the December 17, 1997 vote (P. Resp., ex. 54 at p. 4-5).

[5] The evidentiary hearings were held on January 29, 1998, March 3, 1998, March 19, 1998, March 31, 1998, April 9, 1998, May 12, 1998, June 2, 1998, and June 23, 1998.

*v. Zoning Hearing Board of Upper Makefield Township,* Memorandum Opinion and Order (C.C.P. Bucks Cty. February 23, 1999) (Rufe, J.). On May 7, 1999, Judge Rufe issued a second Opinion further establishing the reasoning of his February 23, 1999 initial Memorandum and Order. *Bennett Levin v. Zoning Hearing Board of Upper Makefield Township,* Opinion (C.C.P Bucks Cty. May 9, 1999) (Rufe, J.).

On March 3, 1999, after consideration of Judge Rufe's February 23, 1999 Memorandum Opinion and Order, the Supervisors voted to empower Mr. Harris to file an appeal, on the Township's behalf, to the Commonwealth Court of Pennsylvania (D. Motion, ex. 46 at p. 7). In an unpublished opinion by Judge Flaherty, the Commonwealth Court affirmed Judge Rufe's Opinion reversing the ZHB's decision to reject Plaintiff's Application. *Bennett Levin v. Zoning Hearing Board of Upper Makefield Township,* Memorandum Opinion (Pa. Commw. May 11, 2000) (Flaherty, J.).

On May 17, 2000, six days after the Commonwealth Court affirmed Judge Rufe's decision, the Supervisors pondered instituting a change to the Canal Setback Ordinance ("Ordinance"), thereby requiring a 100-foot building setback along the Canal (P. Resp., ex. 50 at p. 7). The Ordinance would have severely limited Plaintiff's ability to develop the Property, and would have required another zoning variance. At the November 1, 2000 Upper Makefield Township Board of Supervisors Meeting, 140 members of the general public, most being directly affected by the potential implications of the Ordinance, came to

express their outrage (P. Resp., ex. 51 at p. 1-3).[6] Under harsh public scrutiny, the Supervisors abandoned the Ordinance (P. Resp., ex. 51 at p. 2).[7]

On May 24, 2000, Plaintiff, through his engineer J.G. Park & Associates, Inc., submitted a zoning permit application, a foundation construction permit application, a construction cost estimate, plans for the proposed single-family residence, and plans for the foundation of the proposed single-family residence (P. Resp., ex. 66). Plaintiff paid $2,300 for the foundation building permit (P. Resp., ex. 68).

On June 12, 2000, Mr. Harris filed a Petition for Allowance of Appeal, on behalf of the Township, with the Supreme Court of Pennsylvania. The Township, through Mr. Harris, also notified Plaintiff that it would not issue the foundation or zoning permits until the Supreme Court ruled on the pending appeal. Plaintiff filed for a grading permit on August 23, 2000 (P. Resp., ex. 67), and again was told by the Township that no permits would be issued until the appeal pending before the Pennsylvania Supreme Court was resolved (P. Resp., ex. 49 at p. 2). The Township cashed Plaintiff's $2,300 check before the Supreme Court

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[6] The October 18, 2000 Upper Makefield Township Board of Supervisors Meeting, which immediately preceded the November 1, 2000 meeting, was only attended by 21 members of the public (P. Resp., ex. 52 at p. 1).

[7] After the November 1, 2000 meeting, Supervisor Edward Ford, privately told Richard Pushman, a resident whose home borders the Canal, that the Ordinance was not intended to impact those residents already living on the Canal, but rather the intention was to protect the Canal region from new development. Mr. Pushman knew that Plaintiff's Property was the only potential new development bordering the Canal (P. Resp., ex. 48 at p. 2).

decided the appeal and before the Township issued any of the permits (P. Resp., ex. 68). On November 9, 2000, the Supreme Court denied allocatur.

The Plaintiff was not issued a foundation permit until November 2001, and a final building permit until February 5, 2002 – almost a year-and-a-half after the Supreme Court denied allocatur (P. Resp., ex. 16 at p. 3). In late-January 2002, the Township required Plaintiff to produce proof of workers' compensation insurance, to complete a "Notice of Intent to Construct and Comply" ("Form"), and to provide the results of a well water test, before issuing the final building permit. Plaintiff contends he need not have workers' compensation insurance, there is no mention of the Form in the Township permit application, and a water well test was already submitted with Plaintiff's original zoning variance application dated November 24, 1997 (P. Resp., ex. 70 at p. 2). Nevertheless, Plaintiff satisfied all of the Township's requests, and was issued a final building permit on February 5, 2002, notwithstanding that Plaintiff's architectural and structural drawings were approved on November 7, 2001 (P. Resp., ex. 70 at p. 2).

## I. PROCEDURAL HISTORY

Plaintiff commenced this case by filing a Complaint in the United States District Court for the Eastern District of Pennsylvania (Document No. 1, filed October 26, 1999). Thereafter, Plaintiff filed an Amended Complaint (Document No. 20, filed September 18, 2000), and Defendants' made a Motion to Dismiss the Amended Complaint pursuant to Fed. R. Civ. P 12(b)(6) (Document No. 21, filed October 4, 2000). Defendants' Motion to Dismiss Plaintiff's

Amended Complaint was granted in part and denied in part (Document No. 29, filed May 10, 2001), and the following claims remain in this Court:[8] (i) compensatory damages, punitive damages, attorneys' fees, and equitable relief for violation of Plaintiff's substantive due process rights pursuant to the Civil Rights Act, 42 U.S.C. § 1983, against the Township, all members of the Board of Supervisors in their individual and official capacities, all members of the ZHB in their individual and official capacity, and the Solicitors, in their individual and official capacities; (ii) compensatory and punitive damages for civil conspiracy against the Township, all members of the Board of Supervisors in their individual and official capacities, the members of the ZHB in their individual and official capacities, and the Solicitors, in their individual and official capacity; and (iii) compensatory and punitive damages for abuse of process against the Township, all members of the Board of Supervisors in their individual and official capacities, and the Solicitors, in their individual and official capacities.

Presently before this court are: (i) Defendants' Motion for Summary Judgment on the aforementioned claims (Document No. 51, filed March 29, 2002); (ii) Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment (Document No. 53, filed April 12, 2002); (iii) Defendants' Reply in Support of Defendants' Motion for Summary Judgment (Document No. 54, filed April 26, 2002); (iv) Plaintiff's Supplemental Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment (Document No. 59, filed February 10, 2003); and (v)

[8] By Order, this case was reassigned to the calendar of the Honorable Legrome D. Davis (Document No. 56, filed May 23, 2002).

Defendants' Supplemental Memorandum of Law in Support of their Motion for Summary Judgment (Document No. 60, filed February 10, 2003).[9]

## III. DISCUSSION

This Court exercises subject matter jurisdiction over the substantive due process claim pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, 1343. *Examining Bd. of Eng'rs., Architects & Surveyors v. Otero,* 426 U.S. 572, 583-84, 96 S. Ct. 2264, 2272, 49 L. Ed. 2d 65 (1976). Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Upon a motion for summary judgment, the non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). An issue is genuine if the evidence is such that a reasonable jury could return a judgment in favor of the non-moving party. *Anderson v. Liberty Lobby Inc.,* 477 U.S.

[9] This Court is in receipt of Plaintiff's May 14, 2002 letter requesting permission to submit the Supplemental Declaration of Edward F. Murphy, Esquire, and Defendants' February 19, 2003 letter requesting permission to submit the Declaration of Stephen B Harris, Esquire. Rule 408 of the Federal Rules of Evidence states that settlements or attempts to settle are "not admissible to prove liability or invalidity of the claim or its amount." Additionally, "[e]vidence of conduct or statements made in compromise negotiations is likewise not admissible." Both requests are denied. Any references to the December 1, 1999 or April 13, 2001 settlement conferences will not be considered by this Court.

242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986); *Williams v. Borough of West Chester, Pa.*, 891 F.2d 458, 459 (3d Cir. 1989). Lastly, all facts must be viewed in the light most favorable to the non-moving party, and all reasonable inferences should be drawn from the evidence presented by the non-moving party. *Anderson*, 477 U.S. at 255; *Gass v. Virgin Islands Telephone Corp.*, 311 F.3d 237, 240 (3d Cir. 2002).

### A. Substantive Due Process

Defendants' qualified immunity defense prompts this Court to make a two-part inquiry: (i) whether the Plaintiff has successfully alleged a deprivation of a constitutional right; and (ii) whether the deprived right was clearly established at the time of the suspect event. *County of Sacramento v. Lewis*, 523 U.S. 833, 842 n.5, 118 S. Ct. 1708, 1714 n.5, 140 L. Ed. 2d 1043 (1998); *Eddy v. Virgin Islands Water and Power Auth.*, 256 F.3d 204, 208 (3d Cir. 2001). As a result, this Court must first resolve whether the Plaintiff has alleged a deprivation of a constitutional right. Only after affirmatively answering this initial inquiry is it necessary to consider whether the deprived right was clearly established at the time of the suspect event. *See, e.g., Siegert v. Gilley*, 500 U.S. 226, 232, 111 S. Ct. 1789, 1793, 114 L. Ed. 2d 277 (1991) ("A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is clearly established at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all."); *Nicholas v. Pennsylvania State University*, 227 F.3d 133, 139-40 (3d Cir. 2000) ("To prevail on a non-legislative substantive due process claim, a plaintiff must establish as a threshold matter that he has

a protected property [or liberty] interest to which the Fourteenth Amendment's due process protection applies.") (citation omitted).

A substantive due process claim is actionable under 42 U.S.C. § 1983. *Zinermon v. Burch,* 494 U.S. 113, 125, 110 S. Ct. 975, 983, 108 L. Ed. 2d 100 (1990). A successful substantive due process challenge to an executive act[10] requires the Plaintiff to prove: (i) an interest protected by the Fourteenth Amendment's Due Process Clause; and (ii) the government's deprivation of that protected interest "shocks-the-conscience." *County of Sacramento v. Lewis,* 523 U.S. 833, 846-47, 118 S. Ct. 1708, 1717, 140 L. Ed. 2d 1043 (1998); *United Artists Theatre Circuit, Inc. v. The Township of Warrington, PA.,* 316 F.3d 392, 400 (3d Cir. 2003). Therefore, this Court will first analyze whether the Plaintiff has an interest protected by the Fourteenth Amendment's Due Process Clause.

The Fourteenth Amendment mandates that "no State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The Due Process Clause's procedural protections are complemented by a substantive component – thereby affording more than fair process alone. *Washington v. Glucksberg,* 521 U.S. 702, 719, 117 S. Ct. 2258, 2267, 138 L. Ed. 2d 772 (1997). The substantive sphere bars "certain

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[10] The determination of what constitutes arbitrary action, and hence the legal standard for an alleged substantive due process violation, differs depending on whether the alleged violation is by a legislative or executive action. *See Griswold v. Connecticut,* 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (legislative action); *Rochin v. California,* 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952) (executive action).

government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams,* 474 U.S. 327, 331, 106 S. Ct. 662, 665, 88 L. Ed. 2d 662 (1986); *Hunterson v. Disabato,* 308 F.3d 236, 248 (3d Cir. 2002). Most significantly, substantive due process protects fundamental liberty and property interests.

### 1. Fundamental Interests

#### i. Protected Liberty Interests[11]

Traditionally, substantive due process protects only the most fundamental liberty interests, *see, e.g., Griswold v. Connecticut,* 381 U.S. 479 (right to use contraception and to marital privacy); *Doe v. Delie,* 257 F.3d 309, 317, n.5 (3d Cir. 2001) (same); *Roe v. Wade,* 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) (right to decide to terminate a pregnancy, absent undue state interference); *Planned Parenthood of Central New Jersey v. Farmer,* 220 F.3d 127, 142 (3d Cir. 2000) (same); *Loving v. Virginia,* 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) (right to marriage); *Murillo v. Bambrick,* 681 F.2d 898, 902 (3d Cir. 1982) (same); *Moore v. East Cleveland,* 431 U.S. 494, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1976) (right to live with extended family); *Lutz v. City of York, Pa.,* 899 F.2d 255, 267 (3d Cir. 1990) (same); *Troxel v. Granville,* 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (right of parents to decide care and control of their children); *McComb v.*

[11] In Plaintiff's Amended Complaint he asserted a substantive due process claim based upon the violation of a protected liberty interest. This theory was explicitly abandoned in Plaintiff's Opposition to Defendants' Motion for Summary Judgment (P. Resp. at p. 81, n.33), but this Court will nevertheless give the alleged protected liberty interest a cursory review.

*Wambaugh,* 934 F.2d 474, 483 (3d Cir. 1991) (same),[12] and the Supreme Court is reluctant to further expand the scope of protected liberties unless the right is perceived to be "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Synder v. Com. of Mass.,* 291 U.S. 97, 105, 54 S. Ct. 330, 332, 78 L. Ed. 674 (1934), *overruled on other grounds by Malloy v. Hogan,* 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964); *Lutz,* 899 F.2d at 268. *See also Collins v. City of Harker Heights, Tex.,* 503 U.S. 115, 125, 112 S. Ct. 1061, 1068, 117 L. Ed. 2d 261 (1992). In *Glucksberg,* the Supreme Court of the United States cautioned that, "[b]y extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field.'" 521 U.S. 702, 720 (quoting *Collins,* 503 U.S. at 125); *Phillips v. Borough of Keyport,* 107 F.3d 164, 186 (3d Cir. 1997).

With these judicial policies in mind, this Court will generally tread lightly in the realm of unexplored liberty interests. Liberty interests are typically limited to fundamental rights of the persons, such as family rights, procreation, and the right to bodily integrity. Pecuniary and monetary entitlements, in general, will not be classified as liberty interests worthy of substantive due process protection. The Plaintiff stated that he believes the Defendants violated a protected liberty interest by interfering with his, "right to undisturbed, quiet enjoyment of private property, the right to engage in the valuable use of one's

[12] This list is not exhaustive, and only reflects a sampling of rights protected under the umbrella of substantive due process.

property and the right not [to] have the value of one's property diminished by arbitrary government action." (D. Motion, ex. 53 at p. 11). While every individual should be afforded the rights and protections that Plaintiff demands, it is altogether different to suggest that these rights should be structured as *liberty* interests under substantive due process law. Some of Plaintiff's alleged rights fall under the rubric of protected *property* interests, and others are more appropriately sheltered by the Takings Clause. US CONST. amend. V. The Plaintiff has not asserted that a government actor encroached upon an established liberty interest in violation of Plaintiff's substantive due process rights, and since our "Nation's history, legal tradition, and practices," *Collins,* 503 U.S. at 125, do not suggest that this Court should craft a new, groundbreaking, and potentially far-reaching protected liberty interest, we see no reason to give further consideration to this particular claim.

### ii. Protected Property Interests

Procedural due process protects a broad scope of property rights, and interests often harbored by procedural due process receive disparate substantive due process treatment. *See Mauriello v. U. of Med. & Dentistry of N.J.,* 781 F.2d 46, 50 (3d Cir. 1986); *DeBlasio v. Zoning Bd. of Adjustment for the Township of W. Amwell,* 53 F.3d 592, 599 (3d Cir. 1995), *cert. denied,* 516 U.S. 937 (1995), *overruled on other grounds by United Artists Theatre Circuit, Inc. v. Township of Warrington, PA.,* 316 F.3d 392 (3d Cir. 2003). Analogous to a substantive due process analysis based upon a fundamental liberty interest, a fundamental property interest claim must originate from an "interest encompassed by the Fourteenth Amendment."

*Acierno v. Cloutier,* 40 F.3d 597, 616 (3d Cir. 1994) (citation omitted). However, the Supreme Court noted that:

> property interests . . . are not *created* by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source.

*Board of Regents v. Roth,* 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972) (emphasis added). Generally, state and local laws function as the independent sources, thereby creating property interests potentially deserving of substantive due process protection.

Applying this rationale, the Third Circuit in *DeBlasio* explicitly held that, "ownership is a property interest worthy of substantive due process protection," and that "one would be hard-pressed to find a property interest more worthy of . . . protection than ownership." 53 F.3d at 600-01. Specifically, the Third Circuit stated that land ownership will be protected by substantive due process where a governmental decision "impinges upon a landowner's use and enjoyment of property." *Id.* As a Third Circuit land-use regulation case, *DeBlasio* is directly on point for this specific matter on this particular issue.[13]

It is undisputed that: (i) Plaintiff is the owner of the Property;[14] and (ii) the ZHB, by denying Plaintiff's Application,

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[13] *DeBlasio* was abrogated on other grounds, and is only controlling as a land-use regulation case that established a fundamental property interest protected by substantive due process where a governmental decision restricts or regulates a landowner's use and enjoyment of his/her property.

[14] *Neiderhiser v. Borough of Berwick,* 840 F.2d 213 (3d Cir. 1988), suggests that when a lessor is denied a variance from a local ordinance,

(Continued on following page)

made a decision impinging upon Plaintiff's use and enjoyment of the Property. Therefore, as between the Plaintiff and the ZHB, Plaintiff has clearly established a property interest entitled to substantive due process protection. Defendants allege that the ZHB made the only "decision" to limit Plaintiff's use and enjoyment of his Property, and that the Supervisors and Solicitors (D. Motion, at p. 35) should be dismissed from the substantive due process claim. We find Defendants' position to be narrow and unpersuasive.

The decisions made by the Supervisors, Solicitors, and the ZHB were harmonious and complementary. This is exemplified by the Township's appeals process. The ZHB issued an opinion denying Plaintiff's Application, and Plaintiff appealed the decision to the Court of Common Pleas. From this point on, the ZHB had no influence or affect on the Plaintiff's Application. The ZHB did not represent itself in the appeal to the Court of Common Pleas, and *it* did not vote to authorize a third-party to represent the ZHB's position. As a result of this procedure, logic suggests that some other party must decide whether to appeal or oppose an appeal, lest the ZHB's decisions would have no force, as every appeal from the ZHB would be unopposed in the Court of Common Pleas. The Township's procedure requires the Supervisors to make all appeals decisions by authorizing the Supervisors to dictate whether the Solicitor should represent the ZHB's ruling in front of the Court of Common Pleas. There is no argument that the Township is irrefutably entitled to appeal any case that it sees fit for further consideration, but if the

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the *lessor* would also be afforded the same substantive due process protections as the actual *owner* of the leased property.

Township, through the Supervisors and the Solicitor, is inescapably intertwined in the ZHB's appeals process, then in reality all three entities, the ZHB, the Supervisors, and the Solicitor, are speaking uniformly with one voice. Accordingly, we hold that Plaintiff has established a property interest deserving of substantive due process protection.

### 2. "Shocks the Conscience"

The second prong of a substantive due process challenge to an executive act requires the Plaintiff to prove that the deprivation of a constitutionally protected property interest "shocks-the-conscience." *Lewis,* 523 U.S. at 846-47; *United Artists,* 316 F.3d at 400. The Supreme Court recognized that "with abusive executive action . . . only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense,'" *Lewis,* 523 U.S. at 846, (quoting *Collins,* 503 U.S. at 129), and that the cognizable level of executive abuse of power is measured against that which shocks-the-conscience.

Before the Supreme Court's decision in *Lewis* and for a short time thereafter, the Third Circuit applied the improper motive test to substantive due process claims in land-use regulation cases.[15] For example, in *Bello v. Walker,* 840 F.2d 1124, 1129 (3d Cir. 1987), *overruled by*

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[15] *Lewis* addressed the substantive due process culpability of a law enforcement officer for "causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender," 523 U.S. at 836, and therefore could conceivably be distinguishable from other species of substantive due process claims. *See, e.g., Woodwind Estates Ltd. v. Gretowski,* 205 F.3d 118 (3d Cir. 2000).

*United Artists,* 316 F.3d 392, the Third Circuit held that a meritorious substantive due process claim against municipal officials in a land-use regulation case required the Plaintiff to prove that the officials' decision to deprive the Plaintiff of a property interest afforded substantive due process protection under the Fourteenth Amendment was arbitrary, irrational, or tainted by improper motive. *See also Pace Resources Inc. v. Shrewsbury Tp.,* 808 F.2d 1023, 1035 (3d Cir. 1987). Similarly, in *Woodwind Estates,* a developer sued the township for denying the developer's subdivision plans for low-incoming housing. The court held that the Plaintiff developer could provide the jury with evidence that the township's decision to withhold approval of the plans was arbitrary, irrational, or based upon improper motive, and that summary judgment on the substantive due process claim in favor of the township was inappropriate. 205 F.3d 118 (3d Cir. 2000), *overruled by United Artists,* 316 F.3d 392.

Recently, in *United Artists* the Third Circuit clarified its standard and definitively applied the shocks-the-conscience test to all executive substantive due process claims, while simultaneously overruling *Bello* and its progeny. The Third Circuit stated that its previous land-use regulations rulings are irreconcilable with the Supreme Court's substantive due process analysis under *Lewis,* and that the "less demanding improper motive test for governmental behavior," is no longer applicable. *United Artists,* 316 F.3d at 400. The Third Circuit reinforced the stark contrast between the improper motive and shocks-the-conscience standards by noting that, "the term 'improper' sweeps much more broadly, and neither *Bello* nor the cases that it spawned ever suggest that conduct could be 'improper' only if it shocked the conscience." *Id.*

The implications and levity of this elevated standard are clear, but the Supreme Court has not provided a precise formula for determining what actions specifically constitute conscience shocking behavior. *See Lewis,* 523 U.S. at 847 ("the measure of what is conscience shocking is no calibrated yard stick."). We are only guided by rough contours. *See, e.g., Breithaupt v. Abram,* 352 U.S. 432, 435, 77 S. Ct. 408, 410, 1 L. Ed. 2d 448 (1957) (behavior that shocks the conscience is so "brutal and offensive that it [does] not comport with traditional ideas of fair play and decency."); *United States v. Salerno,* 481 U.S. 739, 746, 107 S. Ct. 2095, 2101, 95 L. Ed. 2d 697 (1987) ("conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty.") (quotation and citation omitted); *Lewis,* 523 U.S. at 849 ("conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level."). Additionally, the force and veracity of the shocks-the-conscience standard is versatile and adaptable, metamorphosing to the particular factual situation, *see, e.g., Lewis,* 523 U.S. at 850 ("Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking."); *Betts v. Brady,* 316 U.S. 455, 462, 62 S. Ct. 1252, 1256, 86 L. Ed. 1595 (1942) ("That which may, in one setting constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in light of other consideration, fall short of such denial."), and as a result of the nature of the standard, its application is not an exacting science. For example, in *Whitley v. Albers,* the Supreme Court held that acts

of "deliberate indifference" could not accurately measure whether an officer's behavior in a prison riot amounted to shocking-the-conscience because in this setting it is inappropriate "to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance," 475 U.S. 312, 320, 106 S. Ct. 1078, 1084, 89 L. Ed. 2d 251 (1986) (emphasis added), and that a lesser standard was more appropriate. On the contrary, the Supreme Court in *Lewis,* 523 U.S. at 850, noted that the actions in *Estelle v. Gamble,* 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251 (1976), exhibited a deliberate indifference to the prisoner's medical needs and would shock-the-conscience since the prison officials had the opportunity to exercise forethought over the inmate's well-being.

The Supervisors decision to oppose Plaintiff's Application, the ZHB's decision to deny Plaintiff's zoning variance Application, and the Supervisors' and Solicitor's subsequent decisions pursuant to the Plaintiff's appeal to the Court of Common Pleas, were not arbitrary in such a manner as to be constitutionally characterized as shocking-the-conscience. On the contrary, the ZHB's opinion is plainly based upon the applicable zoning variance statutes: the Conservation Management Zoning District, the overlay of Floodplain Zoning District § 905, and the five-pronged test under the Municipalities Planning Code § 10910.2, and although this Court will not substantively address whether the ZHB properly applied each of these three governing sets of laws to the Plaintiff's Application, the ZHB's conclusions of law, right or wrong, do not shock-the-conscience. Additionally, the Supervisors specifically supported their opposition to the Plaintiff's Application and their decisions to appeal the case to both the Commonwealth

Court and the Supreme Court, based upon the legitimate safety concerns for the Plaintiff and his family, the safety concerns for the rescue workers, and the potential polluting effect of the proposed on-site sewage system.

The Plaintiff's strongest arguments against Defendants are: (i) the Township delayed issuing a final building permit to the Plaintiff after the Pennsylvania Supreme Court denied allocatur; (ii) the dubious tactic of cashing Plaintiff's $2,300 permit fee before issuing any of the requested permits; and (iii) Edward Ford's conversation with Mr. Pushman that implied that the proposed Setback Ordinance was only intended to restrict Plaintiff from building on his Property. There is evidence suggesting that the Township purposefully delayed issuing the Plaintiff his final building permit *after* the Supreme Court denied allocatur. The Township claimed that the Plaintiff needed to surpass a few minor procedural hurdles, such as proof of workers' compensation insurance, completion of the Form, and redoing the water well test, before issuing the final building permit. We are not overly concerned with the need to complete these requirements before issuing the permits, rather we find it very curious that the Township did not bring these additional requirements to the Plaintiff's attention until late-January 2002, 15 months after the Supreme Court denied allocatur. This chain of events strongly points to a bad motive and purposeful intention to delay issuing the Plaintiff a final building permit, but it does not foster a finding that Defendants' behavior shocked-the-conscience. Similarly, cashing Plaintiff's $2,300 check is senseless and spiteful, but it does not necessarily point to shocking-the-conscience. Furthermore, Mr. Ford's secret-society badinage with Mr. Pushman is most worrisome and unprofessional and circumstantially

points to improper motive, but nevertheless, improper motive is no longer the bar of culpability in land-use regulation substantive due process claims in this Circuit, and therefore Plaintiff's claim is without merit. We conclude that Plaintiff failed to establish that the totality of circumstances, compounding all of Defendants' questionable and unscrupulous behavior, amounted to shocking-the-conscience, and since we find that the Plaintiff was not deprived of any constitutional right, we will forego a superfluous analysis of the second prong of the Defendants' qualified immunity defense claim.

### B. State Law Claims

Federal courts have discretion to exercise supplemental jurisdiction over state law claims if those claims arise from the same common nucleus of operative facts as the claim to which the federal court rightfully asserts original jurisdiction. 28 U.S.C. § 1367; *United Mine Workers v. Gibbs,* 383 U.S. 715, 725, 86 S. Ct. 1130, 1138, 16 L. Ed. 2d 218 (1966); *Pryzbowski v. U.S. Healthcare, Inc.,* 245 F.3d 266, 275 (3d Cir. 2000). Furthermore, a district court has discretion to "decline to exercise supplemental jurisdiction over a claim . . . if the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). However, in *Borough of W. Mifflin v. Lancaster,* the Third Circuit refined the nature of this discretion and held that, "[u]nder *Gibbs* jurisprudence, where the claim over which the district court has original jurisdiction is dismissed *before trial,* the district court *must* decline to decide the pendent state law claims unless considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for doing so." 45 F.3d 780, 788 (3d Cir. 1995) (emphasis added). *See also*

*Growth Horizons, Inc. v. Delaware County,* 983 F.2d 1277, 1284 (3d Cir. 1993).

Neither party has submitted any evidence suggesting that considerations of judicial economy, convenience, or fairness to the parties should prevent this Court from declining to hear the state law claims pursuant to 28 U.S.C. § 1367(c)(3) and *Lancaster.* However, none is needed. This case was commenced in the Eastern District of Pennsylvania over 40 months ago and this Court feels that it would be fundamentally unfair to the parties if we declined to hear the Plaintiff's state law claims. Accordingly, we exercise subject matter jurisdiction over Plaintiff's state law claims pursuant to 28 U.S.C. § 1367(a).

**1. Abuse of Process**

"The action for abuse of process . . . lies where there has been a use of process for some collateral purpose and it is clear that the process must have been intentionally used for that wrongful purpose." *Psinakis v. Psinakis,* 221 F.2d 418, 423 (3d Cir. 1955). Abuse of process is commonly characterized as a "perversion" of the legal process. *Id.* To establish an abuse of process claim plaintiff must show that the defendant: (i) used the legal process against the plaintiff; (ii) primarily for a purpose which the process was not designed; and (iii) plaintiff suffered harm. *Shiner v. Moriarty,* 706 A.2d 1228, 1236 (Pa. Super. 1998). Plaintiff must show some "definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process . . . and that there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." *Id.* (quoting *Di Sante v. Russ Financial Co.,*

380 A.2d 439, 441 (Pa. Super. 1977)). In *Al Hamilton Contracting Co. v. Cowder*, 644 A.2d 188, 192 (Pa. Super. 1994), the court noted that "it is not enough that the defendants had bad or malicious intentions or that the defendant acted from spite or with an ulterior motive," and "there must be an act or threat not authorized by the process, or the process must be used for an illegitimate aim such as extortion, blackmail, or to coerce or compel the plaintiff to take some collateral action."

There can be no argument that the Defendants used the legal process against the Plaintiff and as a result, the Plaintiff suffered harm. However, the Defendants did not use the legal process for some illegitimate aim resulting in a perversion of the legal process. The Defendants felt that the Court of Common Pleas misconstrued the MPC as it applied to the Plaintiff's Application and appealed the case to the Commonwealth Court. Similarly, when the Commonwealth Court affirmed the Court of Common Pleas, the Township chose to Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, thereby exhausting its legal recourse in the Pennsylvania state courts. Until the final decision by the Supreme Court of Pennsylvania to deny allocatur, the Defendants were in line with the legitimate objectives of the legal process,[16] and there is no proof of an illegitimate aim such as "extortion, blackmail, or to coerce or compel the plaintiff to take some collateral action." *Id.* Furthermore, this Court finds it significant that *Plaintiff* initiated the underlying legal

[16] There is evidence that the Defendants delayed issuing Plaintiff's permits *after* the Supreme Court denied allocatur, however, at this point, this case no longer falls within the realm of abuse of process because the legal process has already run its course.

process and that the Defendants only acted to appeal the trial court's decision, reversing the ZHB's holding, to the Commonwealth Court and Supreme Court of Pennsylvania. Of course, an appellant can be liable for abuse of process, but the Plaintiff will have a higher burden to overcome where the appellant is appealing a decision that was reversed by the trial court, because in this situation it is more likely that there could be a legitimate discrepancy in the interpretation or application of relevant law. Accordingly, we find that the Plaintiff's abuse of process claim is without merit.

### 2. Civil Conspiracy

A claim for civil conspiracy has three essential elements: (i) two or more persons; (ii) combined or agreed; (iii) with the "intent to do an unlawful act or to do an otherwise lawful act by unlawful means." *Thompson Coal Co. v. Pike Coal Co.,* 488 Pa. 198, 211, 412 A.2d 466, 472 (1979); *Scully v. U.S. WATS, Inc.,* 238 F.3d 497, 516 (3d Cir. 2001). Furthermore, proof of malice is required in a successful civil conspiracy claim. *Thompson Coal,* 488 Pa. at 211; *Tyler v. O'Neill,* 994 F. Supp. 603, 612 (E.D. Pa. 1998). It is also clear that "since liability for civil conspiracy depends on performance of some underlying tortious act, the conspiracy is not independently actionable; rather it is a means for establishing vicarious liability for the underlying tort." *Beck v. Prupis,* 529 U.S. 494, 503, 120 S. Ct. 1608, 1615, 146 L. Ed. 2d 561 (2000) (quoting *Halberstam v. Welch,* 705 F.2d 472, 479 (D.C. Cir. 1983)); *Boyanowski v. Capital Area Intermediate Unit,* 215 F.3d 396, 407 (3d Cir. 2000). *See also Allegheny General Hosp. v. Phillip Morris, Inc.,* 228 F.3d 429, 446 (3d Cir. 2000) ("aiding and abetting and civil conspiracy require an

underlying tort cause of action."); *In re: Orthopedic Bone Screw Prods.,* 193 F.3d 781, 789 (3d Cir. 1999) ("The established rule is that a cause of action for civil conspiracy requires a separate underlying tort as a predicate for liability."). Civil conspiracy only acts as a mechanism for casting a wide net of liability on co-conspirators, who themselves may not have committed a tortious act. *Beck,* 529 U.S. at 494.

Plaintiff asserts that, "the indicia of a common plan to preserve open space in Upper Makefield Township establishes a conspiracy among the defendants." (P. Resp., at p. 113). However, as a prerequisite to civil conspiracy liability, the Plaintiff must prove that the Defendants have some underlying tort liability, and since we dismissed all other counts against the Defendants, then as a matter of law, they cannot be held liable for civil conspiracy. *See In re: Orthopedic Bone Screw Prods.,* 193 F.3d at 789. *See also Jones v. Johnson & Johnson,* 1997 WL 549995, at *13 (E.D. Pa. 1997) (plaintiff's civil conspiracy to defame claim must fail since the underlying defamation claim was insufficient); *Pelagatti v. Cohen*, 536 A.2d 1337, 1342 (Pa. Super. Ct. 1987) ("absent a civil cause of action for a particular act, there can be no cause of action for civil conspiracy."). Accordingly, we find that Plaintiff's civil conspiracy claim is without merit.

## IV. CONCLUSION

Based on the foregoing reasons, Defendants' Motion for Summary Judgment is granted. An order has been issued.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| BENNETT LEVIN,<br>Plaintiff,<br><br>v.<br><br>UPPER MAKEFIELD TOWNSHIP, et al.,<br>Defendants. | : CIVIL ACTION<br>: NO. 99-CV-5313 |

**ORDER**

AND NOW, this 26th day of February, 2003 upon consideration of (i) Defendants' Motion for Summary Judgment (Document No. 51, filed March 29, 2002); (ii) Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment (Document No. 53, filed April 12, 2002); (iii) Defendants' Reply in Support of Defendants' Motion for Summary Judgment (Document No. 54, filed April 26, 2002); (iv) Plaintiff's Supplemental Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment (Document No. 59, filed February 10, 2003); and (v) Defendants' Supplemental Memorandum of Law in Support of their Motion for Summary Judgment (Document No. 60, filed February 10, 2003), it is hereby **ORDERED** that Defendants' Motion for Summary Judgment is **GRANTED**. This is a final legal judgment and the Clerk of Court is directed to statistically close this matter.

BY THE COURT:

/s/ _____
Legrome D. Davis, U.S.D.J.

COURT OF COMMON PLEAS OF BUCKS COUNTY,
PENNSYLVANIA CIVIL ACTION – LAW

| | | |
|---|---|---|
| BENNETT LEVIN | : | No. 98-6152-18-5 |
| | : | |
| vs. | : | |
| ZONING HEARING BOARD | : | |
| OF UPPER MAKEFIELD | : | |
| TOWNSHIP | : | |

MEMORANDUM OPINION AND ORDER

Bennett Levin has appealed the decision of the Upper Makefield Township Zoning Hearing Board, which denied his application for a variance to construct a single-family residence, to the Court of Common Pleas of Bucks County. The initial application to the Zoning Hearing Board was filed November 28, 1997. A series of eight hearings was held before the Upper Makefield Township Board between January 29, 1998 and June 23, 1998 at the conclusion of which, the Board denied the application on August 13, 1998. Levin timely appealed to this Court on September 9, 1998; the Township intervened on October 1, 1998. A conference was held pursuant to Bucks County Rule of Civil Procedure, Rule 27 on November 6, 1998 at which time a briefing schedule was structured to submit the issue before the Court. The record has not been supplemented, so that the standard of review on appeal requires a determination of whether the Board committed an error of law or abuse of discretion. An abuse of discretion occurs when the findings of the Zoning Hearing Board are not supported by substantial evidence, meaning evidence that a reasonable mind would find adequate to support the findings.

It has been often recited that "Generally, a property owner seeking a variance must establish that:

(1) an unnecessary hardship will result if the variance is denied; due to the unique circumstances or conditions of the property;

(2) because of such physical circumstances or conditions the property cannot be developed in strict conformity with the provisions of the zoning ordinance and a variance is necessary to enable the reasonable use of the property;

(3) the hardship is not self-inflicted;

(4) granting the variance will not alter the essential character of the neighborhood nor be detrimental to the public welfare; and

(5) the variance sought is the minimum variance that will afford relief."

*Township of Harrison v. Smith*, 161 Pa. Commw. 166, 636 A.2d 288 (1993)

The Zoning Hearing Board's decision of August 13, 1998 took pains to deal with each of these five requirements, finding in each instance that appellant had not sustained his burden. We respectfully disagree, and find that the Zoning Hearing Board manifestly abused its discretion in denying the application.

First, the Zoning Hearing Board found nothing unique about the property in question. In so finding, the board blithely ignored the impact of the flood plain restrictions upon a piece of property which would otherwise present a choice residential building site.

Second, in finding that the premises in question could be used for forestry, agriculture or horticulture, the Board ignored the dramatic alteration necessary to the premises to render it suitable for any of the suggested uses. Acreage would have to be cleared for agriculture or horticulture; including the planting of Douglas firs or other pines, or evergreens. Other than for a few select trees currently on the tract, harvestable hardwoods would have to be planted and grown before a forestry use were available. The Zoning Board's suggestion that these are reasonable alternative uses is disingenuous. Reasonable calculations into the cost of creating such uses were brushed aside. While we recognize that the unnecessary hardship engendered by the denial of the variance cannot be merely economic, we cannot believe, nor could the Zoning Board maintain, that a business could be operated at a loss for an extended period of time as a justification that there were alternative uses available to the owner for the property.

Third, the fact that the appellant purchased the premises with knowledge of the existing zoning does not justify a conclusion that the hardship was self-inflicted. Pennsylvania Courts have held, that "a new owner should not be denied a variance solely because he got the property at a discount and knew of its nonconformity". *Ruddy v. Lower Southampton Township Zoning Hearing Board*, 669 A.2d 1051, 1054 (1995).

Fourth, the Zoning Hearing Board maintained that the grant of the variance would alter the essential character of the neighborhood. The basis for that finding was that "the proposed dwelling with the associated fill would cause an increase in flood elevation at the time of a 100 year flood of six inches, and that flood water

velocity would be similarly increased. The conclusion of law was not factually supported, and was well refuted by appellant. We find unacceptable a suggestion that one residence at the edge of the Delaware river, at the crest of a 100 year flood, the last such flood having occurred in 1955 (which flood we witnessed) would cause the flooded river to increase an additional six inches in elevation with a comparable increase in velocity. The accompanying arguments advanced by the Board about safety concerns because the Delaware River occasionally overflows the banks and floods River Road are misplaced in a variance application, unless the Township sees it as its responsibility under its inherent police powers, for the safety of its residents, to condemn all other residences situate in the same floodplain, and evict such residents.

Finally, the board quibbled with the size of the single-family residence sought by appellant in suggesting that the application was not the minimum variance which would afford relief. The Board trivialized the variance application process by suggesting a minimum variance could have been satisfied if the applicant had sought approval of a "much smaller structure for use as a boat house or a much smaller summer home that could be elevated in some manner".

The Zoning Hearing Board strained logic and reason at every juncture to deny appellant's application. It abused its discretion. We therefore enter the following:

## ORDER

AND NOW, this 23rd day of February, 1999, the decision of the Lower Makefield Township Zoning Hearing Board is hereby REVERSED. The variance sought by Appellant is granted.

BY THE COURT:

/s/ John J. Rufe
JOHN J. RUFE
Judge

**COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA CIVIL ACTION - LAW**

| | | |
|---|---|---|
| BENNETT LEVIN | : | No.: 98-6152-18-5 |
| vs. | : | |
| ZONING HEARING BOARD OF UPPER MAKEFIELD TOWNSHIP | : | |

## OPINION

By Memorandum Opinion and Order dated February 23, 1999, we reversed the decision of the Upper Makefield Township Zoning Hearing Board denying the request for a variance by Petitioner, Bennett Levin. Having received notice that Upper Makefield Township has appealed our decision to the Commonwealth Court of Pennsylvania, we write this Opinion in further support of our Order, incorporating herein the Memorandum Opinion of February 23, 1999.

Petitioner, Bennett Levin, is the owner of an unimproved tract of land located along River Road in Upper Makefield Township, Bucks County, containing 7.0176 acres. The tract is bordered on one side by the Delaware River and on the other side by the Delaware Division of the Pennsylvania Canal. Route 32 or River Road runs through the tract. The entire parcel is located within the CM-Conservation Management Zoning District[1] of the

[1] The Conservation Management District consists of valuable natural resources, such as woods, agricultural soils, floodplains, wetlands, aquifer recharge areas and areas of steep slopes . . . For these reasons, uses are permitted in both type and intensity which provide

(Continued on following page)

Upper Makefield Township Zoning Ordinance. It is also located within the Flood Fringe Area of the Delaware River Flood Plain as delineated in the Newtown Area Joint Municipal Zoning Ordinance and its accompanying FEMA maps.

In November of 1997, Petitioner submitted an application for a variance to the Upper Makefield Township Zoning Hearing Board for the purpose of allowing Petitioner to construct a single family residence upon the parcel. Although single family residences are permitted in an area zoned for conservation management, Section 905 (1)(F)(1) of the Joint Municipal Zoning Ordinance provides that the Floodplain District shall be an overlay to the existing district, and, therefore, the provisions of the Floodplain District serve as a supplement to the underlying district provisions. Thus, Petitioner's application for a variance had to comply with all of the requirements delineated at Section 905(IV)(E) of the Joint Municipal Zoning Ordinance. Moreover, under this section, all applicants are required to comply with the "Procedure for Applicant Requesting Special Exception or Variance from the Requirements of Section 905, Floodplain District, of the Newtown Area Joint Municipal Zoning Ordinance"

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the maximum opportunities for open space in order to protect the natural resources and encourage the continuation of farming activities. Single-family detached, single-family detached cluster and performance subdivisions are permitted, provided sewage disposal methods shall replenish the water table in accordance with the wastewater policies of the Joint Municipal Comprehensive Plan and the Sewage Facilities Plan (Act 537) of the participating municipality where building or development is proposed. Section 306 (B) of the Joint Municipal Zoning Ordinance.

which is incorporated in Exhibit B to Article IX of the Joint Municipal Zoning Ordinance.[2]

The Zoning Hearing Board conducted a series of eight hearings on Petitioner's application. The Township entered its appearance in opposition to the application, as did three adjacent property owners who received party status. On August 13, 1998, the Board rendered its written decision denying the requested variance. A timely appeal by Petitioner to this Court followed and the Township entered its appearance and intervened. A conference was held in chambers in compliance with Bucks County Local Rule 27 wherein it was agreed that the Court would not take any additional evidence. Both parties submitted briefs and a return of the record of the proceedings before the Zoning Hearing Board was made. Upon review of the entire record, we entered our Opinion and Order reversing the Board.

Where the trial court receives no additional evidence, the Hearing Board's decision must be affirmed unless there has been an abuse of discretion or an error of law. 53 P.S. Section 11005-A. An abuse of discretion occurs when the findings of the Board are not supported by substantial evidence. Substantial evidence has been defined as such

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[2] Petitioner's application was accompanied by an existing feature plan which identified, by size and species, every tree located on the property. It also included a separate plan identifying the proposed location of the home, the proposed location of the on-site sanitary sewer disposal system, the proposed location of the on-site well and the suggested driveway location accessing River Road. Petitioner's application included a report by the Consulting Engineer which contained additional studies, plans and certifications including a HEC II Study. These were all submitted as required by and for compliance with Section 905.

evidence as a reasonable mind would find adequate to support such findings. *Collier Stone Co. v. ZHB for Township of Collier*, 710 A.2d 123, 125 (Pa. Commw. 1998).

The law governing a variance request is now well established. A party seeking a variance must establish five criteria: (1) an unnecessary hardship due to the unique physical circumstances or conditions of the property; (2) that the property cannot be developed in strict conformity with the zoning ordinance provisions because of the unique physical circumstances or conditions and that a variance is needed in order to allow the reasonable use of the property; (3) that the hardship is not self-inflicted; (4) that the grant of the variance will not alter the character of the neighborhood or be detrimental to the public health, safety and welfare; and (5) that the requested variance is the minimum variance that will afford relief. *Ruddy v. Lower Southampton Township*, 669 A.2d 1051, 1053 (Pa. Commw. 1995); *Township of Harrison v. Smith*, 161 Pa. Commw. 188, 836 A.2d 288 (1993); *Birmingham Township v. Chadds Ford Tavern*, 132 Pa. Commw. 312, 572 A.2d 855 (1990). As we stated previously in our Memorandum Opinion, the decision of the Zoning Hearing Board went to great lengths to discuss each of these five requirements, concluding that Petitioner had not satisfied one of the five. We believe that the Board's findings of fact and conclusions of law are not supported by substantial evidence and that the Board abused its discretion in denying Petitioner's application.

A substantial portion of the testimony presented to the Board concerned the issue of whether the property could be used for any of the permitted uses in a CM-Conservation Management Zoning District. Petitioner was required to establish that compliance with the zoning

ordinance would render the property virtually useless, thereby demonstrating unnecessary hardship. *Polansky v. Zoning Hearing Board of Mt. Lebanon*, 139 Pa. Commw. 579, 590 A.2d 1388 (1991). The Board, relying exclusively upon the testimony of the Township's witnesses, determined that the property could be used for various types of agriculture, horticulture or forestry without the need for a variance. While we acknowledge that it is solely for the Board to evaluate testimony and to assess credibility of witnesses, we also recognize that the Board's decisions must be supported by "substantial" evidence. It is not enough to simply present evidence contrary to a petitioner's application. Rather, the evidence must be such that reasonable minds could find it worthy of belief. Here, the testimony on which the Board relied in finding an alternative use fell short of that standard.

The first alternative use for the property suggested by the Board was forestry. In so finding, the Board relied upon the testimony of Darryl Triube of the U.S. Department of Agriculture. Mr. Triube was called to refute the testimony of Samuel R. Willard, a forester, who concluded that the property had little to no utility for forestry purposes. Mr. Willard stated that under the requirements of the ordinance, it would take a minimum of five years, with considerable expense, to clear the property and plant high grade trees. Then it would take an additional 75 years before the newly-planted trees would be a viable resource for income. The testimony of Mr. Triube, which the Board found so persuasive, was in agreement with this time table. He stated:

> A. Yes. Forestry is agricultural, but it is not something you reap tomorrow or at the end of the year. It is a very long-term process. When I mean

> long term I am talking if you or I or anyone else in this room would forest their land, we would never harvest it. (Emphasis added).

(N.T. 6-2-98, p. 56).

Certainly, the Ordinance did not contemplate forcing a property owner to use his property for a purpose of which he would reap no benefit, economic or otherwise. Moreover, a review of the whole of Mr. Triube's testimony reveals it to be full of conclusions with no factual support. Mr. Triube simply recited that some of the trees on the property had value. Exactly what degree of value was never addressed. Moreover, Mr. Triube admitted that he did not know whether the cost of extracting the trees was more than the amount of money which could be recouped from the sale of said trees. The Board referred to photos which showed a substantial number of large trees on the property. However, there was nothing of record refuting Petitioner's evidence that most of the large trees on the property were low grade, with little commercial value.

Finally, we are compelled to note that despite the Board's overwhelming concern regarding the effect the proposed dwelling would have on the floodplain and the cumulative effect such a structure would have on the area, the Board accepted the alternative use of a forestry operation without considering, to any degree, what effect such use would have on the area and the floodplain. We find it greatly disturbing that the Board could not see the irony of forcing Petitioner to destroy the 475 trees currently existing on a property which is located in an area zoned Conservation Management, especially when the use proposed by Petitioner would only require the destruction of 30 trees, ten inches or less in diameter. We also find it troubling that the neighboring property owners – so

concerned with the aesthetic make-up of the surrounding area, had little problem with having the foliage on the property systematically eliminated. If these intervening property owners were concerned that the small, rural community flavor would be compromised by Petitioner's proposed dwelling, certainly the substitution of a commercial enterprise would not be a satisfactory alternative.

Thus, we determined that the Board's conclusion that forestry was a viable alternative use for the property was not supported by substantial evidence.

The Board also determined that the property could reasonably be used for an agriculture purpose without the grant of a variance. This conclusion is unsubstantiated for several reasons. First, Section 401(B) of the Ordinance specifically provides that the minimum lot area for agricultural uses is either five (5) or ten (10) acres. Here, there are two lots making up one property, the larger consisting of 4.0090 acres and the smaller consisting of 1.9722 acres, after subtracting the existing right-of-way space (which the Township agreed was required – See Reply Brief of Upper Makefield Township, p. 6). In determining that agriculture was a valid alternative use for the property, the Board relied upon the whole of the two tracts which totals 5.9812 acres. However, when considering the use of the property for agriculture, the Township's witness, Mr. Michael Fournier, testified:

> Q. Realistically, how much of the lower site, the two acre site between the river and River Road which you have now seen, would you recommend someone attempting to farm it?
>
> A. None.

Q. On this lower end?

A. That's correct.

(N.T. 6-2-98, p.31)

If the lower tract cannot be used for agriculture, as testified to by the witness upon which the Board relied in rendering its decision, then the remaining amount of acreage is less than the required minimum five acres. Consequently, the Board incorrectly determined that the parcel contained the requisite minimum acre requirements for agriculture uses under the Ordinance.

Second, the Board stated in Conclusion of Law No. 2, that, "the property could be used as a nursery similar to an existing nursery now in operation in neighboring Solebury Township." A review of the testimony which supports this Conclusion by the Board reveals it to be extremely speculative. The whole of Mr. Fournier's testimony regarding this option is as follows:

Q. Are you aware of any other kinds of agricultural production that might work in a situation under trees?

A. There is one nurseryman that I am aware of in New Hope who rents land similar to the property we are talking about who likes to have some of the nursery stock under those trees. Specifically, he grows some native species.

As a matter of fact, I am on the Board of Directors and a nonprofit organization who owns some land. We have leased him three acres of that property because he does have a nursery. He wants to put his nursery under the three acres of wooded land. That is in effect what he

> has done. There is one nurseryman that I am aware of who likes that type of environment to grow some of his nursery stock under partial shade.

(N.T. 6-2-98, p. 24)

This testimony is shocking for the amount of information it fails to contain. At best, it is a vague reference to an unnamed nurseryman growing an unnamed crop. There is no discussion indicating how the properties are similar or even whether the Solebury property is in the floodplain. There is no indication whether this other person is using the property for business or for a hobby. There is no indication whether the nursery operation was successful in growing its crop. There is no comparison of the soils. There is no comparison as to the surrounding foliage. Yet, the Board found this one paragraph to be a substantial reason to deny the Petitioner a variance. Certainly, the Board would have been shocked and insulted if Petitioner had presented this kind of vague, speculative and inconsequential testimony in support of his Application. We cannot, in good conscience, conclude that this testimony is capable of supporting the Board's decision regarding an agricultural use for the property in question.

Finally, we note that the Board failed to consider that fact that in order to use the property for agriculture, it would have to be cleared entirely of the trees which currently exist on it. As mentioned previously, this would take a minimum of five years to complete under the requirements of the Ordinance. Also, the Board made no determinations of the impact a commercial agriculture enterprise, such as a pick-your-own blueberry business, would have on the floodplain or on the surrounding community.

For all of these reasons, we determined that the Board's conclusion that agriculture was a viable alternative use for the property was not supported by substantial evidence. Rather, we believe that the whole of the testimony proved that compliance with the zoning ordinance would render the property virtually useless and, therefore, Petitioner demonstrated an unnecessary hardship.

Additionally, the Board's conclusion that, "the essential character of the neighborhood would be adversely affected should the dwelling be constructed as proposed" (Conclusion of Law No. 13) is unfounded. The intervening property owners are all located within immediate proximity to the proposed site. They are all homeowners whose houses are in the floodplain. Likewise, there are at least eight single family dwellings located within a mile and one-half radius of the property in question. We are uncertain of the factual basis for the Board's conclusion that a single family dwelling is not consistent with the existing neighborhood. Likewise, we fail to understand what kind of adverse impact Petitioner's proposed dwelling would have on the surrounding community, as the Board made no indication in its Opinion.

We also determined that the remainder of Conclusion of Law No. 13, which determined that the dwelling and associated fill would cause an increase in the height and velocity of the flood waters which would be detrimental to the public welfare, is completely without factual support. All of the calculations which were submitted with Petitioner's Application, as required by the Ordinance, showed that there would be no increase in the height of the flood waters and a de minimis (0.3 ft/sec.) increase in velocity. Both of these figures were confirmed by the Township's own engineer in both his report and his testimony. Our

review of the testimony and exhibits of record revealed no calculations to the contrary. Thus, we are unable to ratify the Board's conclusion on this issue.

Moreover, we were particularly troubled with the Board's conclusion regarding the last criterion for a variance, namely, whether the requested variance is the minimum variance that would afford relief. As was stated in our Memorandum Opinion, the Board's comments in this regard are astounding. Quibbling with the size of the proposed structure only serves to belittle the seriousness of the requested relief. The Ordinance which allows for a variance to be granted, makes no restrictions pertaining to size and we do not find it appropriate for the Board to submit its own restrictions. Moreover, the Board's willingness to permit a smaller structure, "for use as a boat house or a much smaller summer home . . . " (Conclusion of Law No. 3) creates an inherent conflict in forcing the alternative uses of forestry and agriculture upon Petitioner in order to prevent granting a variance for a structure. Since the Township's own engineer agreed that the proposed dwelling satisfied all of the area and design requirements of the Ordinance, the Board's opinions regarding the substitution of a smaller structure are irrelevant to the issue of whether the requested relief is the minimum variance needed.

Finally, the Board was required to address the health, safety and welfare issues deriving from an application to build in the floodplain which are listed in Section 905(IV)(E) of the Ordinance. The Board concluded that the risk to emergency personnel and equipment obliged to attempt to rescue persons at the residence in times of flood was too great to allow the grant of a variance. Likewise, despite the fact that Petitioner planned to install flood

warning devices in addition to those used by the Township, the Board found that "all of the early warning devices known to man cannot oblige a homeowner to leave his property if he is not inclined to do so." (Finding of Fact No. 9).

In order to emphasize the speculative nature of this concern and the lack of substantial evidence to support the Board's conclusion, we refer to a series of questions asked of the Township Engineer, Mr. Robert P. Williams:

Q. . . . Let's talk about what would have to happen for this issue that you're concerned about to be a reality. One, Mr. Levin would have to be home. I suppose it's possible that he might not be during a rain event?

A. He or somebody from his family sure . . .

Q. So we have to have somebody in the home, rain like crazy, no telephone, no electricity, the water level sensors on either side of River Road would not be operative because the battery back up was bad because otherwise they would notify the Levins of the need to possibly consider moving themselves from the residence, right?

A. Yes.

Q. The battery back up in the weather, radio that we said that we would maintain on the property would have to be bad or otherwise we'd get notification that way. The backup power from the diesel generator would be unavailable for whatever reason, right?

A. Sure.

Q. And that we'd have to, somebody would have to be in that house and be completely unaware of the surroundings for at least 10 hours because up until 10 hours we can get out on River Road and they'd have to be either asleep or sick completely unaware for another 11 hours based on your calculations? (Emphasis added).

A. I guess that's supposing that they would heed the warnings and exit the property.

Q. So all of those things would have to coalesce at one time for the threat or at least the concern that you have about this access to be a reality?

A. Again, supposing that they would heed the warnings you would need a chain of events similar to that, at least up until 10 hours or so on River Road started to become unavailable for vehicular access.

(N.T. 3-31-98, pp. 52-54).

Clearly, this is an extraordinary chain of events which both parties agreed would have to occur before the perceived threat to the health, safety and welfare of any person would be in jeopardy. In fact, there would be a 21 hour window of opportunity for any person in the house to exit the premises without the need for emergency personnel. The Board's reliance upon a concern that there can be no assurance that the Petitioner would leave the residence is too remote to constitute "substantial" evidence.

Finally, the Board devotes much of its Opinion to its concerns over the cumulative effect of development within the floodplain. While we acknowledge that the cumulative effect of structures in the floodplain is and must be a valid

concern for the Township. It cannot be the basis for denying Petitioner's application. Section 905 does not require an applicant for a variance to evaluate the cumulative effect of his proposed use; and, if all of the floodplain concerns and objective criteria set forth in Section 905 of the Ordinance have been satisfied by the Applicant, the variance should be granted. In this regard, we were concerned with whether the Board ever intended to allow Mr. Levin to build on this property in light of the testimony of Mr. Michael Frank, a professional planner. Mr. Frank, who was involved in the preparation of floodplain regulations, stated:

> A. . . . The intent of the municipalities and others like Upper Makefield does not permit new homes in the hundred-year flood plain but to qualify the municipality for the Federal Flood Insurance Program, they've got to stick in those provisions for variance and special exceptions which causes this dilemma.
>
> Q. So it's a loser. The relief that is contemplated, at least Section 905 isn't real, the way you view it?
>
> A. It's there because the Federal Flood Insurance Program requires them to be there. . . . I'm trying to explain there is this dilemma that the use regulations under Section 905 don't permit new homes in the flood plain but subsections of 905 set evaluation criteria for special exceptions and variances. That is the dilemma.

(NT 3-31-98, pp. 91-93).

What is apparent from Mr. Frank's testimony is that the sections of the Ordinance which allow for a party to seek a variance to build a single family home in the flood fringe are only there so that the municipality can qualify for federal assistance. Based upon Mr. Frank's testimony, on which the Board heavily relied, the Township does not intend to allow any person to build a new structure in the floodplain. Thus, Petitioner's application was decided long before any testimony was presented to the Board. There may in fact be a fundamental problem with the requirements of the Federal Emergency Management Agency, which the Township should seek to resolve, but not at Petitioner's expense. The Board was required to evaluate the material contained in the application and determine if it satisfied the criteria established by Section 905 of the Ordinance. We were not convinced that the Board fairly and impartially carried out that responsibility. Thus, we believed that the Board committed an abuse of its discretion in denying Petitioner's application and reversed its decision.

BY THE COURT:

/s/ John J. Rufe
JOHN J. RUFE, Judge

Date: May 7, 1999

IN THE COMMONWEALTH
COURT OF PENNSYLVANIA

| | | |
|---|---|---|
| BENNETT LEVIN | : | |
| v. | : | No. 654 C.D. 1999 |
| | : | Submitted: August 6, 1999 |
| ZONING HEARING BOARD OF UPPER MAKEFIELD TOWNSHIP | : | |
| UPPER MAKEFIELD TOWNSHIP, Appellant | : | |

BEFORE: HONORABLE DORIS A. SMITH, Judge
HONORABLE JIM FLAHERTY, Judge
HONORABLE JESS S. JIULIANTE, Senior Judge

*OPINION NOT REPORTED*

MEMORANDUM OPINION
BY JUDGE FLAHERTY FILED: May 11, 2000

Upper Makefield Township (Township) appeals from an order of the Court of Common Pleas of Bucks County (trial court) which reversed the decision of the Zoning Hearing Board of Upper Makefield Township (Board) thereby granting the variance request of Bennett Levin (Levin) to construct a single-family dwelling within the flood plain district. We affirm.

Levin is the owner of approximately 7 acres of land located in the CM-Conservation Management Zoning District of the Upper Makefield Township Zoning Ordinance. The tract is bordered on one side by the Delaware River and on the other side by the Delaware Division of the Pennsylvania Canal. River Road bisects the property

creating a large and small lot. The land is also located within the floodplain district as delineated by the Newton Area Joint Municipal Zoning Ordinance (Ordinance) and the FEMA maps. Although single family dwellings are permitted in the CM district, they are not permitted in the floodplain district. On November 28, 1997, Levin submitted an application to the Board for a variance from the requirements at Section 905 of the Ordinance in order to construct a single family dwelling with on-lot water and sewer facilities.[1] The Board denied the request, finding that the property could be used for various types of agriculture, horticulture or forestry without the need for a variance. Levin appealed to the trial court which, without taking additional evidence, reversed the decision of the Board and determined that substantial evidence did not support the Board's determination that Levin's property could be used for any of the permitted purposes. This appeal followed.

In deciding whether to grant a variance, five factors must be considered: (1) whether there are unique physical circumstances peculiar to the property and that such unnecessary hardship is due to such a condition; (2) that because of the physical aspects, the property cannot be developed in strict conformity with the ordinance and a variance is necessary to enable the reasonable use of the property; (3) that the hardship has not been created by the applicant; (4) that the variance will not alter the essential

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[1] Levin also submitted an existing feature plan which identified by size and species all trees located on his property. Levin also submitted a plan identifying the proposed located of the home, the proposed location of the on-site sanitary sewer system, the on-site well and the suggested driveway location. Levin's application also included a HEC-II study. All of the above were required by Section 905 of the Ordinance.

character of the neighborhood; and (5) that the variance requested is the minimum variance necessary to afford relief. *Cope v. Zoning Hearing Board of South Whitehall Township*, 578 A.2d 1002 (Pa. Cmwlth. 1990). In this case, the Board determined that Levin failed to meet all of the above criteria. We will address each of these requirements to determine if, as determined by the trial court, substantial evidence does not support the Board's conclusion that Levin failed to meet the requirements.

First, we observe that unnecessary hardship can be established by showing that the physical features of the property are such that it cannot be used for a purpose permitted under the ordinance or that the property can be conformed for a permitted use only at a prohibitive expense. *Allegheny West Civic Council, Inc. v. Zoning Board of Adjustment of the City of Pittsburgh*, 547 Pa. 163, 167-68, 689 A.2d 225, 227-28 (1997). Unnecessary hardship can also be shown by evidence that the property is unfit for any purpose permitted by the zoning ordinance. *Id.* Here, although the Board found that the property could be used for various types of agriculture, horticulture or forestry without the need for a variance, as discussed below, such a determination is not supported by substantial evidence.

With respect to whether the property can be developed in strict conformity with the ordinance, the Board determined that it could be used for the permitted purposes of forestry, agriculture or horticulture. As to forestry, the Board relied on the testimony of Darryl Triube in concluding that the property could be used for a small scale forestry. However, we agree with the trial court that in practical terms, forestry is not a viable option. Specifically, Mr. Triube stated that forestry is a long term process and that if anyone were to forest their land, they would never actually harvest it

because of the time commitment. Moreover, although Mr. Triube testified that presently there are trees on the property which could be harvested, he did not know whether the cost of extracting the trees would be more than the amount of money which would be recouped from the sale of the trees.

As to an agricultural use, Michael Fournier, whom the Board found credible, testified that Levin would need to clear the land of the trees. (R.R. at 336a.) As the Ordinance only permits 20% removal per year, this would take five years. In addition, he only recommended that only the larger four acre lot be farmed as it was not feasible to farm the smaller two acre lot. (R.R. 339a.) and that given the inherent limitations of the site, it would be difficult to farm the site. 9R.R. at 341a.)

Finally, the Board determined that the property could be used for a nursery based on testimony by Mr. Fournier. Mr. Fournier stated that there is a nursery in Solebury Township, wherein a portion of the nursery is operated on three acres of wooded land. (R.R. at 332a) As the trial court stated however, the "testimony is shocking for the amount of information it fails to contain." (trial court opinion at p.9.) There was no comparison of the lands, no indication of whether the nursery is run as a hobby or for a profit and no comparison of the soils. At best, Mr. Fournier's testimony suggests that some plants can be grown in partial shade. However, it does not support the Board's conclusion that Levin's property can be used for a nursery.

The evidence heard by the Board shows that Levin's property cannot be used in compliance with the zoning ordinance. Thus, the trial court properly reversed the decision of the Board.

Next, we agree with the trial court that the hardship has not been created by Levin. The lot at issue was in single and separate ownership prior to the adoption of the Townships flood plain district regulations, *Ruddy v. Lower Southampton Township*, 669 A.2d 1051 (Pa. Cmwlth. 1995), and the property suffers unnecessary hardship as a result of changes in zoning.

As to the fourth requirement, we agree with the trial court that the essential character of the neighborhood would not be adversely affected by the proposed dwelling. Levin proposes to construct a single family dwelling and the evidence indicates that there are at least eight single family dwellings located within one and one half miles of the property. Moreover, all of the intervenors in this case were homeowners whose houses are in the floodplain. Thus, we agree with the trial court that the addition of a single family dwelling would not adversely affect the neighborhood which already consists of single family dwellings.

Finally, we will address whether the variance requested is the minimum necessary to afford relief. The Board determined that a boat house or smaller summer home would be more appropriate. However, we agree with the trial court that the Ordinance, which allows for a variance to be granted, makes no restrictions pertaining to size. Levin seeks a variance to construct a single family dwelling. That the Board prefers Levin to construct a smaller home is of no moment.

Accordingly, the order of the trial court is affirmed.

/s/ Jim Flaherty
JIM FLAHERTY, Judge

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

| | | |
|---|---|---|
| BENNETT LEVIN | : | |
| v. | : | |
| ZONING HEARING BOARD OF UPPER MAKEFIELD TOWNSHIP | : | No. 654 C.D. 1999 |
| UPPER MAKEFIELD TOWNSHIP, Appellant | : | |

**ORDER**

NOW, May 11, 2000, the order of the Court of Common Pleas of Bucks County, at No. 98-6152-18-5, dated February 23, 1999, is affirmed.

/s/ Jim Flaherty
JIM FLAHERTY, Judge

**IN THE SUPREME COURT OF PENNSYLVANIA**
**MIDDLE DISTRICT**

| | | |
|---|---|---|
| BENNETT LEVIN, | : | No. 400 M.D. Alloc. Dkt. 2000 |
| v. | : | |
| ZONING HEARING BOARD OF UPPER MAKEFIELD TOWNSHIP | : | Petition for Allowance of Appeal from the Order and Memorandum Opinion of the Commonwealth Court |
| PETITION OF: UPPER MAKEFIELD TOWNSHIP | : | |

**ORDER**

PER CURIAM:

AND NOW, this 9th day of November, 2000, the Petition for Allowance of Appeal is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No: 03-1860

BENNETT LEVIN,

Appellant

v.

UPPER MAKEFIELD TOWNSHIP, BUCKS COUNTY, PENNSYLVANIA; ROSE MARIE SAUTER; CONRAD BALDWIN; WILLIAM GUNSER; EDWARD X FORD; JOHN TITTERTON; LAWRENCE SALTZMAN; JOHN WALSH; BARBARA HIRST; ROBERT GORRING; ERIC FISHER; MICHAEL FRANK; STEVEN HARRIS, ESQUIRE; GREGORY STURN, ESQUIRE; HARRIS & HARRIS, ATTORNEYS; JOHN DEVLIN; MARY DEVLIN; JONATHAN LAMM; MARY LAMM; THOMAS KOVACEVICH; MARY KOVACEVICH; DEBORAH DEVLIN; DONNA V. LAMM

**SUR PETITION FOR REHEARING EN BANC**

BEFORE: SCIRICA, *Chief Judge*, SLOVITER, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF, FISHER, *Circuit Judges*

The petition for rehearing on behalf of Appellant in the above-entitled case, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the petition for rehearing en banc is hereby **DENIED.**

**IT IS SO ORDERED.**

By the Court,
/s/ Theodore A. McKee
Circuit Judge

DATED: May 13, 2004
CMH/cc: SHL, HRF, BEJQ, KMS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| BENNETT LEVIN<br>Plaintiff | : | |
| v. | : | |
| UPPER MAKEFIELD TOWNSHIP, ROSE MARIE SAUTER, CONRAD BALDWIN, WILLIAM GUNSER, EDWARD FORD, JOHN TITTERTON, LAWRENCE SALTZMAN, JOHN WALSH, BARBARA HIRST, ROBERT GORRING, ERIC FISHER, MICHAEL FRANK, STEVEN HARRIS, Esq., GREGORY STURN, Esq., HARRIS & HARRIS, attorneys<br>Defendants | : | CIVIL ACTION<br>No. 99-CV-5313 |

**NOTICE OF APPEAL**

(Filed March 26, 2003)

Notice is hereby given that Bennett Levin, Plaintiff above named, appeals to the United States Court of Appeals for the Third Circuit from the order and final judgment entered in this action on February 26, 2003 granting Defendants' Motion for Summary Judgment.

Respectfully submitted,

HAMBURG, RUBIN, MULLIN,
MAXWELL & LUPIN

BY: /s/ Steven H. Lupin
STEVEN H. LUPIN, ESQUIRE
I.D. NO. 17987
375 Morris Road, Box 1479
Lansdale, PA 19446
215-661-0400
Attorneys for Plaintiff
Bennett Levin

Date: 3/26/03

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | |
|---|---|
| **BENNETT LEVIN,**<br>Plaintiff<br>v.<br>**UPPER MAKEFIELD TOWNSHIP; ROSE MARIE SAUTER**, Individually and in Her Official Capacity as a Member of the Upper Makefield Township Board of Supervisors; **CONRAD BALDWIN**, Individually and in His Official Capacity as a Member of the Upper Makefield Township Board of Supervisors **WILLIAM GUNSER**, Individually and in His Official Capacity as a Member of the Upper Makefield Township Board of Supervisors; **EDWARD FORD**, Individually and in His Official Capacity as a Member of the Upper Makefield Township Board of Supervisors; **JOHN TITTERTON**, Individually and in His Official Capacity as a Member of the Upper Makefield Township Board of Supervisors; **LAWRENCE SALTZMAN**, Individually and in His Official Capacity as a Member of the Upper Makefield Township Board of Supervisors; **JOHN WALSH**, Individually and in His Official Capacity as Member of the Upper Makefield Township Board of Supervisors; **BARBARA HIRST**, | : CIVIL ACTION<br>: NO. 99-CV-5313<br>: JURY TRIAL DEMANDED<br>: (Filed Sep. 18, 2000) |

Individually and in Her Official :
Capacity as Member of the Upper :
Makefield Township Zoning :
Hearing Board **ROBERT** :
**GORRING**, Individually and in :
His Official Capacity as Member :
of the Upper Makefield Township :
Zoning Hearing Board; **ERIC** :
**FISHER**, Individually and in :
His Official Capacity as Member :
of the Upper Makefield Township :
Zoning Hearing Board; **MICHAEL** :
**FRANK**, Individually and in :
His Official Capacity as Planner :
of Upper Makefield Township :
Planner; **STEVEN HARRIS,** :
**ESQUIRE**, Individually and in :
His Official Capacity Solicitor :
Of Upper Makefield Township; :
**GREGORY STURN, ESQUIRE,** :
Individually and his Official :
Capacity as Solicitor of Upper :
Makefield Township; **HARRIS** :
**& HARRIS, ATTORNEYS,** :
Each Individually and in Their :
Official Capacity as Solicitors :
to Upper Makefield Township; :
**JOHN DEVLIN and** :
**DEBORAH DEVLIN**, Husband :
and Wife; **JONATHAN LAMM** :
**and DONNA V. LAMM**, Husband :
and Wife; and **THOMAS** :
**KOVACEVICH and MARY** :
**KOVACEVICH**, Husband and Wife. :
:
Defendants

## AMENDED COMPLAINT

Plaintiff Bennett Levin, by his undersigned attorneys, avers as follows:

## NATURE OF ACTION

1. Mr. Levin commences this action for (i) compensatory damages, punitive damages, attorneys' fees and equitable relief for violation of his substantive due process rights pursuant to the Civil Rights Act, 42 U.S.C. § 1983; (ii) compensatory damages, punitive damages, attorneys' fees and equitable relief for violation of his procedural due process rights pursuant to the Civil Rights Act, 42 U.S.C. § 1983; (iii) compensatory damages, punitive damages, attorneys' fees and equitable relief for conspiracy to violate his civil rights pursuant to the Civil Rights Act, 42 U.S.C. § 1983; (iv) compensatory and punitive damages for civil conspiracy; (v) compensatory and punitive damages for abuse of process; ;and (vi) compensatory damages, punitive damages and attorneys' fees for violations of Pennsylvania's Dragonetti Act, 42 Pa. C.S.A. § 8351.

## THE PARTIES

2. Plaintiff Mr. Levin is an adult individual who resides at 11 Barclay Court, Newtown, Pennsylvania 18940.

3. Defendant Upper Makefield Township (the "Township") is a municipal governmental entity township of the second class under the laws of the Commonwealth of Pennsylvania.

4. Defendant Rose Marie Sauter is an adult individual who resides at 9 Canal Run West, Washington

Crossing, Pennsylvania and at times relevant to this Complaint was the Chair of the Upper Makefield Township Board of Supervisors ("Board of Supervisors").

5. Defendant Conrad Baldwin is an adult individual who resides at 1212 Eagle Road, Newtown, Pennsylvania and at times relevant to this Complaint was the Vice Chair of the Board of Supervisors.

6. Defendant William Gunser is an adult individual who resides at 881 Highland Road, Newtown, Pennsylvania and is a member of the Board of Supervisors.

7. Defendant Edward Ford is an adult individual who resides at 995 Washington Road, Washington Crossing, Pennsylvania and is a member of the Board of Supervisors.

8. Defendant John Titterton is an adult individual who resides at 1021 River Road, Washington Crossing, Pennsylvania and at times relevant to this Complaint was a member of the Board of Supervisors.

9. Defendant Lawrence Saltzman is an adult individual who resides at 102 Meadow View Road, Washington Crossing, Pennsylvania and at times relevant to this Complaint was a member of the Board of Supervisors.

10. Defendant John Walsh is an adult individual who resides at 1225 Eagle Road, Newtown, Pennsylvania and at times relevant to this complaint was a member of the Board of Supervisors.

11. Defendant Barbara Hirst is an adult individual resides at 1076 Eagle Road, Newtown, Pennsylvania and at times relevant to this complaint was a member of the

Upper Makefield Township Zoning Hearing Board ("Zoning Hearing Board").

12. Defendant Robert Gorring is an adult individual who resides at 1251 General Washington Road, Washington Crossing, Pennsylvania and is a member of the Zoning Hearing Board.

13. Defendant Eric Fisher is an adult individual who resides at 1146 Eagle Road, Newtown, Pennsylvania and at times relevant to this Complaint was a member of the Zoning Hearing Board.

14. Defendant Michael Frank is an adult individual who resides at 56 South Franklin Street, Doylestown, Pennsylvania and is the Upper Makefield Township Planner.

15. Defendants Steven Harris, Esquire and Gregory Sturn, Esquire are adult individuals and members of the bar of the Commonwealth of Pennsylvania who maintain an office at 1760 Bristol Road, Warrington, Pennsylvania 18976 and were, at times relevant to this Complaint, Solicitors to Upper Makefield Township.

16. Defendant Harris & Harris, Attorneys is a law firm that maintains an office at 1760 Bristol Road, Warrington, Pennsylvania 18976 and was, at times relevant to this Complaint, Solicitor to Upper Makefield Township.

17. Defendants John Devlin and Deborah Devlin (collectively, "Devlins") are adult individuals who at all times relevant hereto owned real estate and resided at 30 Jericho Run, Washington Crossing, Bucks County, Pennsylvania 18977.

18. Defendants Jonathan Lamm and Mary Lamm (collectively, "Lamms") are adult individuals who at all times relevant hereto owned real estate and resided at 28 Jericho Run, Washington Crossing, Bucks County, Pennsylvania.

19. Defendants Thomas Kovacevich and Mary Kovacevich (collectively, "Kovaceviches") are adult individuals who at all times relevant hereto owned real estate and resided at 34 Jericho Run, Washington Crossing, Pennsylvania.

## FACTUAL BACKGROUND

20. This matter arises out of the individual and collective efforts of defendants to obstruct and hinder Mr. Levin's ability to use and enjoy real estate which he purchased in Upper Makefield Township, Bucks County, Pennsylvania. Defendants have ignored clear and unambiguous provisions of law for the purposes of denying Mr. Levin of his property and liberty interests secured by the 14th Amendment of the United States Constitution and denying Mr. Levin of his right to fair and honest governmental services. As a result of defendants' unlawful actions, Mr. Levin has sustained substantial damages and emotional distress. Defendants' intentional actions also warrant the imposition of punitive damages.

21. Mr. Levin is the owner of an unimproved, 7.0176 acre tract of land located along River Road in Upper Makefield Township, Buck County, Pennsylvania (the "Property"). The Property is bisected by River Road (State Highway 32), one of the significant traffic arteries in both the Township and Bucks County and consists of two parcels or lots. One lot located between SR 32 and the

Delaware River and the other lot located between SR 32 and the Canal.

22. Mr. Levin purchased the Property in June of 1997 with the intent to build a single family home on the larger parcel located between SR 32 and the Canal in which he intended to reside with his wife.

23. The Property is bordered on one side by the Delaware River and on the other side by the Delaware Division of the Pennsylvania Canal.

24. The entire Property is located in the CM-Conservation Management Zoning District (the "CM District") pursuant to the Upper Makefield Township Zoning Ordinance.

25. The Property is located within the Flood Fringe Area of the Delaware River Flood Plain as defined by the Federal Insurance Administration.

26. Construction of single family residences in the CM District is permitted use in accordance with the terms of the zoning ordinance.

27. The Property is also located within the "flood fringe area" of the Delaware River Flood Plain as delineated in the Newtown Area Joint Municipal Zoning Ordinance and its accompanying Federal Emergency Management Agency ("FEMA") maps.

28. Prior to purchasing the Property, Mr. Levin met twice with the Township's zoning officer David Kuhns to determine whether the applicable ordinances permitted the building of a single family home on the Property.

29. At both meetings, Kuhns, acting in his official capacity as a representative of the Township, represented to Mr. Levin that the construction of a single family home on the Property was permitted as long as Mr. Levin complied with the requirements of Section 905(IV)(E) of the Joint Municipal Zoning Ordinance.

30. In particular, the Joint Municipal Zoning Ordinance required Mr. Levin to obtain a "HEC-II" study, setting forth the impact, if any, the construction of a single family home would have on the Delaware River Flood Plain.

31. Mr. Levin commissioned, paid for and obtained a HEC II study from a registered professional engineer. The HEC II study concluded that the construction of a single family home on the Property would not result in any rise in the 100 year flood levels based upon the 1978 Flood Insurance Study, a requirement of Section 905 of the Joint Municipal Zoning Ordinance.

32. In addition, Mr. Levin went to the extraordinary length of measuring the potential impact of the construction of his home against the proposed but yet unadopted 1995-1996 U.S. Army Corps of Engineers study of the Delaware River. The HEC II study obtained by Mr. Levin demonstrated that the flood plain would not be adversely affected under this standard as well as the currently enforced standard.

33. Following receipt of the HEC-II study on November 28, 1997, Mr. Levin submitted to the Township an application for a variance to construct a single family home on the Property pursuant to Section 905 of the Newtown Area Joint Municipal Zoning Ordinance as amended (the "Joint Zoning Ordinance").

34. Mr. Levin submitted with the application documents required under the Township Zoning Ordinance and the Joint Municipal Zoning Ordinance, including a plan specifically identifying the proposed location of Mr. Levin's home, the proposed on-site sanitary sewer disposal system and suggested driveway accessing River Road; a feature plan identifying every tree on the Property; and an engineer's report containing additional plans, certifications, and studies, including the HEC-II study. He also was required to drill a test well and submitted an analysis of the water quality. He was also required to dig sewage test pits and have the County certify as to the suitability of the soil to properly serve a septic field.

35. All of the plans, studies and certifications submitted by Mr. Levin complied with the procedural and substantive requirements of Section 905 of the Joint Municipal Zoning Ordinance.

36. Having met all of the requirements of the Joint Municipal Zoning Ordinance and controlling law, Mr. Levin was entitled to the issuance of a variance and a permit to construct his single family home on the Property.

37. As a result of the unique physical circumstances and conditions of the Property, Mr. Levin would sustain an unnecessary hardship without the issuance of the requested variance, and his Property would be rendered useless.

38. The requested variance is required in order for Mr. Levin to make reasonable use of the Property. The Property cannot be developed without a variance because of the unique physical circumstances and conditions.

39. The hardship which Mr. Levin will sustain if the requested variance does not issue is not of his own making.

40. The grant of the variance requested by Mr. Levin will not alter the character of the neighborhood or be detrimental to the public health, safety and welfare.

41. The variance requested by Mr. Levin is the minimum variance needed in order for him to construct his single family residence.

42. The Township's failure to issue a variance would render the Property virtually useless to Mr. Levin.

43. Mr. Levin has a property interest in the issuance of the variance and the necessary permits which is protected by the 14th Amendment of the United States Constitution.

44. Upon establishing he has met the requirements of the applicable Township ordinances and regulations and the laws of the Commonwealth of Pennsylvania, the Township must issue the variance and lacks any discretion to reject Mr. Levin's application.

45. The Township hired a professional engineering firm to review Mr. Levin's application for a variance.

46. Prior to receiving the Township's engineer's report and other necessary information on the proposed development of the single family residence on the Property, members of the Board of Supervisors met without giving notice to Levin and formally voted to oppose the Mr. Levin's application.

47. The Township Board of Supervisors' decision to oppose Mr. Levin's request for a variance was wholly unrelated to the merits of the application.

48. Contrary to the provisions in its flood plain regulations, the Township never intended to grant any variance to permit new homes in the flood plain of the Delaware River. The Township included the provisions allowing for the issuance of a variance solely to qualify the municipality for the Federal Flood Insurance Program.

49. By including provisions for the grant of variances to develop real estate, including the Property, located in the fringes of the Delaware River flood plain without ever intending to grant the authorized variances, the Township presented false and misleading information to the federal government and the owners of real estate in the Township, including Mr. Levin.

50. The Township's decision to oppose Mr. Levin's application for the issuance of a variance was made in bad faith and was improperly motivated by, among other things, the Township's decision to qualify for the Federal Flood Insurance Program.

51. The Township's decision to oppose Mr. Levin's application for the issuance of a variance was arbitrary and not rationally related to any legitimate government interest.

52. Upon information and belief, Mr. Harris and Harris & Harris assisted the Township in formulating its policy of denying all applications for variances for construction of new homes in the flood plain and in contriving reasons to oppose Mr. Levin's application, including the claim that the Property should be considered as a single

unit even though it was bisected by River Road and under Pennsylvania law must be considered as two separate parcels.

53. The Township's engineer concurred with the findings of the HEC-II study and other engineering studies performed which determined that Mr. Levin's proposed development of the Property met the requirements of Section 905 of the Joint Zoning Ordinance and recommended that the variance be granted to Mr. Levin.

54. Specifically, the engineer hired by the Township agreed with the engineer hired by Mr. Levin that:

a. no danger to life or property would result from the proposed construction of Mr. Levin's home;

b. no materials on-site would be swept on to other lands or downstream property owners to the detriment of downstream property owners;

c. the proposed on-site water and on-site sanitary sewer disposal systems which would serve Mr. Levin's home met all applicable Bucks County Health Department regulatory standards.

d. The structural design for Mr. Levin's home and its component parts satisfied Section 905 requirements so as to minimize the susceptibility of his home to flood damage and the impact of any such damage on Mr. Levin.

55. Mr. Levin's application for the issuance of a variance and a permit was opposed by John Devlin, Jonathan Lamm and Thomas Kovacevich who with their

respective spouses owned properties neighboring the Property (the Devlin, Lamms and Kovaceviches are hereinafter collectively referred to as the "Neighboring Landowners"). The Neighboring Landowners requested and were granted permission by the Zoning Hearing Board to intervene in opposition to Mr. Levin's request for the issuance of the variance, and were granted "party status."

56. Each of the properties owned by the Neighboring Landowners contain single family dwellings and are located within the Delaware River flood plain. There are a substantial number of single family dwellings located within a mile and one-half radius of the Property.

57. Prior to the start of the hearings and without the presentation or consideration of any evidence, the Zoning Hearing Board predetermined that Mr. Levin's application would be denied.

58. The Zoning Hearing Board has three members, each of whom is appointed to serve by the Township Board of Supervisors.

59. The preordained denial of Mr. Levin's request for a variance was in furtherance of the official custom, policy and practice of the Township and the Board of Supervisors to deny homeowners the right to develop real estate in the fringes of the flood plain in direct contravention to the applicable ordinances and regulations.

60. Between January 29, 1998 and July 30, 1998, the Township's Zoning Hearing Board held a series of eight hearings on Levin's application for the issuance of a variance.

61. At the Zoning Hearing Board hearings, Mr. Levin's application for the issuance of a variance was

opposed by the Township and the Neighboring Landowners.

62. The Township Board of Supervisors was represented at the Zoning Hearing Board hearings by defendants Harris & Harris and Sturn.

63. Harris & Harris and Sturn knew or should have known that Mr. Levin was entitled to the issuance of a variance construct a single family dwelling on the Property and that the Township's opposition was without any factual or legal basis.

64. The Neighboring Landowners unlawfully conspired and combined with the Township and its officials to deprive Mr. Levin of his right to a variance and a permit to construct his single family home on the Property. Just prior to Gorring officially being appointed as a member of the Zoning Hearing Board, Devlin, met unlawfully and improperly with Gorring to discuss the case before the Township Zoning Hearing Board and to formulate opposition to Mr. Levin's application for a variance. Upon information and belief, Devlin met with Gorring on behalf of himself and the other Neighboring Landowners.

65. On August 13, 1998, the Zoning Hearing Board issued a written decision denying Mr. Levin's request for a variance.

66. The Zoning Hearing Board's refusal of the requested variance was without any factual or legal basis and was in furtherance of the official policy, custom and practice of the Township to deny Levin the right to develop in the fringes of the flood plain notwithstanding the right to do so pursuant to controlling ordinance and regulations.

67. The Zoning Hearing Board's decision ignored and/or capriciously rejected the clear and uncontradicted testimony that Mr. Levin met the requirements of Section 905 of the Joint Zoning Ordinance. No reasonable person of ordinary intelligence could have reached the conclusion arrived at by the Zoning Hearing Board.

68. The Zoning Hearing Board's decision rendered Mr. Levin's Property sterile and useless.

69. The Zoning Hearing Board's refusal to grant Mr. Levin the requested permit was wholly unrelated to merits of his application.

70. Without the grant of the requested variance, Mr. Levin's Property is rendered useless.

71. The Zoning Hearing Board's decision was rendered in bad faith and with improper motive, i.e., to further the Township's policy, custom or practice to qualify for the federal flood insurance program without actually permitting any new homes to be constructed in the fringes of the flood plain.

72. In refusing to grant Mr. Levin the requested variance, the Zoning Hearing Board ignored and failed to consider the evidence presented during the eight nights of testimony.

73. In failing to consider the evidence presented at the hearing, the Zoning Hearing Board deprived Mr. Levin of his right to a fair and meaningful hearing prior to the deprivation of his property and liberty interests.

74. In accordance with his rights under Municipalities Planning Code of the Commonwealth of Pennsylvania, Levin appealed Zoning Hearing Board's refusal to grant a

variance and issue the necessary permits to the Court of Common Pleas of Bucks County. The appeal was styled "Bennett Levin v. Zoning Hearing Board of Upper Makefield Township, No. 98-6152-18-5."

75. The Township, through defendants Harris & Harris, intervened in the case before the Court of Common Pleas and opposed Levin's appeal of the Zoning Hearing Board's refusal to grant the variance and necessary permit to construct his single family residence on the Property.

76. By Opinion and Order dated February 23, 1999, the Court of Common Pleas of Bucks County reversed the decision of the Zoning Hearing Board to deny Mr. Levin's request for the issuance of a variance.

77. The Township has appealed the Court of Common Pleas's decision to the Commonwealth Court of Pennsylvania and has failed to issue the variance which the Court of Common Pleas of Bucks County determined must be granted to Mr. Levin.

78. Subsequent to the Township's filing of its appeal, the Court of Common Pleas of Buck County issued its Opinion dated May 7, 1999: In its Opinion, the Court of Common Pleas of Buck County determined, among other things, that the Zoning Hearing Board's findings of fact and conclusions of law "were not supported by substantial evidence" and that the Zoning Hearing Board "abused its discretion in denying [Mr. Levin's] application." The Court of Common Pleas also determined conclusions of the Zoning Hearing Board to be "extremely speculative," "unfounded" and "without factual support."

79. In addition, the Court of Common Pleas determined Mr. Levin's application was decided long before any

testimony was presented to the Zoning Hearing Board. The Court of Common Pleas's conclusion was bolstered by the testimony of the Township's professional planner who disclosed that the Township never intended to permit the construction of new homes in the hundred year flood plain and included the provisions providing for the issuance of variances solely to qualify for the federal flood insurance program.

80. The Court of Common Pleas' decision is an adjudication on the merits of Mr. Levin's right to the requested variance.

81. By pursuing a challenge to the variance that lack probable cause and factual and legal merit, the Township and its attorneys' abused and perverted the judicial process.

82. The mere delay in issuing to Mr. Levin the variance and necessary permits to construct his home on the Property is a denial of a property interest protected by the 14th Amendment of the United States Constitution.

83. The delay of the Township, the Board of Supervisors and the Zoning Hearing Board in issuing the permits is based upon bad faith, improper motives and/or arbitrary reasons and not related to any legitimate government interest.

84. Mr. Levin has a vested right in the approvals, variance and/or permits to pursuant to which he is entitled to develop and use the Property under state law. In reliance upon the Township's representations that the Property could be developed if the requirements of § 905 were satisfied, Mr. Levin expended substantial sums for

the acquisition of the Property and the preparation of engineer reports.

85. As a proximate result of the unlawful actions of the defendants, Mr. Levin has sustained damages in an amount in excess of $100,000.

86. In addition, the unlawful actions of the defendants have caused Mr. Levin to suffer emotional distress.

87. The intentional, deliberate, wilful, wanton and/or reckless actions of the defendants are so outrageous as to warrant the imposition of punitive damages.

## COUNT I

### Mr. Levin v. Municipal Defendants (Violations of 42 U.S.C. § 1983 – Substantive Due Process Rights)

88. Mr. Levin incorporates paragraphs 1-87 by reference as if set forth fully herein.

89. The Civil Rights Act, 42 U.S.C. § 1983, provides that a person who has been deprived of his or her rights secured by the United States Constitution and federal law may recover from those who have acted under the color of state law.

90. The Township, and its officials Sauter, Baldwin, Gunser, Ford, Titterton, Saltzman, Walsh, Hirst, Gorring, Fisher, Frank, Harris, Sturn, and Harris & Harris (hereinafter collectively referred to as the "Municipal Defendants") are state actors within the meaning of the Civil Rights Act.

91. The Municipal Defendants deprived Mr. Levin of his property interests secured under the 14th Amendment of the United States Constitution by:

a. denying him the right to use and enjoy the Property;

b. denying him the variance to which he was entitled under the rules and regulations of the Township and the laws of the Commonwealth of Pennsylvania;

c. denying him the right to a permit which he was required in order to construct a home on the Property; and

d. delaying in issuing the variance and permits to which Mr. Levin is entitled in order to construct a home on the Property.

92. In addition, the Municipal Defendants deprived Mr. Levin of his liberty interests secured under the 14th Amendment of the United States Constitution by:

a. maliciously abusing the judicial process;

b. pursuing challenges to the requested variance for reasons unrelated to the merits of the application;

c. pursuing challenges to the requested variance without probable cause and without a factual or legal basis for doing so.

93. The Municipal Defendants acted individually and in conspiracy with one another.

94. The actions of the Municipal Defendants in depriving Mr. Levin of his property and liberty interests were motivated by bad faith and improper motive and/or were made arbitrarily and irrationally and not in furtherance of a legitimate governmental interest.

95. The actions of the Municipal Defendants to deprive Mr. Levin of his civil rights were made in an intentional, deliberate, wilful, reckless, grossly negligent and/or negligent manner. The Municipal Defendants knew or were recklessly indifferent to the harm they caused Mr. Levin.

96. As a result of the Municipal Defendant's violations of the Mr. Levin's civil rights, Mr. Levin has sustained damages in an amount in excess of $100,000.

97. Moreover, as a result of the Municipal Defendants' violations of Mr. Levin's civil rights, Mr. Levin has sustained emotional distress.

98. The intentional, deliberate, wilful, wanton, reckless and/or grossly negligent conduct of the Municipal Defendants is so outrageous as to warrant the imposition of punitive damages.

99. Pursuant to the Civil Rights Act, Mr. Levin is entitled to recover the costs and attorneys' fees which he incurs as a result of the defendants' unlawful conduct.

100. The Civil Rights Act empowers this Court to enjoin future unlawful activity of the Municipal Defendants.

WHEREFORE, for the foregoing reasons, Mr. Levin requests this Court to enter judgment in his favor and against the Municipal Defendants for:

a. compensatory damages in an amount in excess of $100,000, plus interest, costs and attorneys' fees as permitted by applicable law;

b. damages in an amount which this Court deems to be just and proper for emotional distress;

c. damages in an amount which this Court deems to be just and proper for punitive damages;

d. a permanent injunction prohibiting the Township and its officials from violating Mr. Levin's civil rights in the future; and

e. such further relief as this Court deems to be just and proper.

## COUNT II

**Mr. Levin v. Municipal Defendants**
**(Violations of 42 U.S.C. § 1983 –**
**Procedural Due Process Rights)**

101. Mr. Levin incorporates paragraphs 1-100 by reference as if set forth fully herein.

102. The Civil Rights Act, 42 U.S.C. § 1983, provides that a person who has been deprived of his or her rights secured by the United States Constitution and federal law may recover from those who have acted under the color of state law.

103. The Township, and its officials Sauter, Baldwin, Gunser, Ford, Titterton, Saltzman, Walsh, Hirst, Gorring, Fisher, Frank, Harris, Sturn, and Harris & Harris (hereinafter collectively referred to as the "Municipal Defendants") are state actors within the meaning of the Civil Rights Act.

104. Under the 14th Amendment of the United States Constitution, a person cannot be deprived of life, liberty or property without due process of law.

105. The Municipal Defendants deprived Mr. Levin the procedural process which is required to protect against the unlawful deprivation of his property and liberty interests. Specifically, the Municipal Defendants deprived Mr. Levin of the opportunity for a fair and impartial hearing by holding a meeting regarding opposing Mr. Levin's application for a variance without providing notice to Mr. Levin, and by predetermining the result of his application for a variance without considering the merits thereof and without considering, weighing and evaluating the evidence presented in the eight days of testimony before the Zoning Hearing Board.

106. If the Municipal Defendants had properly considered, weighed and evaluated the evidence presented before the Zoning Hearing Board, then Mr. Levin would have been granted the variance and the necessary permits to construct a single family dwelling on the Property.

107. The Municipal Defendants acted individually and/or in conspiracy with one another.

108. The actions of the Municipal Defendants to deprive Mr. Levin of his civil rights were made in an intentional, deliberate, wilful, reckless, grossly negligent and/or negligent manner. The Municipal Defendants knew or were recklessly indifferent to the harm they caused Mr. Levin by denying him of the procedural protection which he was due under the United States Constitution.

109. As a result of the Municipal Defendants' violations of the Mr. Levin's civil rights, Mr. Levin has sustained damages in an amount in excess of $100,000.

110. Moreover, as a result of the Municipal Defendants' violations of Mr. Levin's civil rights, Mr. Levin has sustained emotional distress.

111. The intentional, deliberate, wilful, wanton, reckless and/or grossly negligent conduct of the Municipal Defendants is so outrageous as to warrant the imposition of punitive damages.

112. Pursuant to the Civil Rights Act, Mr. Levin is entitled to recover the costs and attorneys' fees which he incurs as a result of the defendants' unlawful conduct.

113. The Civil Rights Act empowers this Court to enjoin future unlawful activity of the Municipal Defendants.

WHEREFORE, for the foregoing reasons, Mr. Levin requests this Court to enter judgment in his favor and against the Municipal Defendants for:

a. compensatory damages in an amount in excess of $100,000, plus interest, costs and attorneys' fees as permitted by applicable law;

b. damages in an amount which this Court deems to be just and proper for emotional distress;

c. damages in an amount which this Court deems to be just and proper for punitive damages;

d. a permanent injunction prohibiting the Township and its officials from violating Mr. Levin's civil rights in the future; and

e. such further relief as this Court deems to be just and proper.

## COUNT III

### Mr. Levin v. Neighboring Landowners (Conspiracy to Violate of 42 U.S.C. § 1983)

114. Mr. Levin incorporates paragraphs 1-113 by reference as if set forth fully herein.

115. By intervening and seeking party status in opposing Mr. Levin's request for a variance and his efforts to construct a single family dwelling on the Property, the Neighboring Landowners agreed and conspired with the Municipal Defendants to deprive Mr. Levin of his civil rights.

116. The Neighboring Landowners' opposition to Mr. Levin's request for a variance was based solely on the Neighboring Landowners' self interest and improper motive of preserving their view of an undeveloped sylvan environment in perpetuity.

117. The Neighboring Landowners' unlawful conspiracy with the Municipal Defendants deprived Mr. Levin of his property interests secured under the 14th Amendment of the United States Constitution by:

a. denying him the right to use and enjoy the Property;

b. denying him the variance to which he was entitled under the rules and regulations of

the Township and the laws of the Commonwealth of Pennsylvania;

c. denying him the right to a permit which he was required in order to construct a home on the Property; and

d. delaying in issuing the variance and permits to which Mr. Levin is entitled in order to construct a home on the Property.

118. In addition, the Neighboring Landowners' unlawful conspiracy with the Municipal Defendants deprived Mr. Levin of his liberty interests secured under the 14th Amendment of the United States Constitution by:

a. maliciously abusing the judicial process;

b. pursuing challenges to the requested variance for reasons unrelated to the merits of the application;

c. pursing challenges to the requested variance without a factual or legal basis for doing so.

119. In addition, Neighboring Landowners' unlawful conspiracy with the Municipal Defendants deprived Mr. Levin of his rights to procedural due process by denying him of a fair and impartial hearing, the right to have the evidence presented at the Zoning Hearing Board hearing decided on the merits and the right to have his application for a variance determined on the merits.

120. The unlawful conspiracy of the Neighboring Landowners to deprive Mr. Levin of his civil rights was intentional, deliberate, wilful, reckless grossly negligent and/or negligent. The Neighboring Landowners knew or were recklessly indifferent to the harm they caused Mr. Levin by conspiring to deprive him of his civil rights.

121. As a result of the Neighboring Landowners' conspiracy to violate Mr. Levin's civil rights, Mr. Levin has sustained damages in an amount in excess of $100,000.

122. Moreover, as a result of the Neighboring Landowners' conspiracy to violate Mr. Levin's civil rights, Mr. Levin has sustained emotional distress.

123. The intentional, deliberate, wilful, wanton, reckless and/or grossly negligent conduct of the Neighboring Landowners is so outrageous as to warrant the imposition of punitive damages.

124. Pursuant to the Civil Rights Act, Mr. Levin is entitled to recover the costs and attorneys' fees which he incurs as a result of the defendants' unlawful conduct.

125. The Civil Rights Act empowers this Court to enjoin the future unlawful conduct of the Municipal Defendants.

WHEREFORE, for the foregoing reasons, Mr. Levin requests this Court to enter judgment in his favor and against the Neighboring Landowners for:

a. compensatory damages in an amount in excess of $100,000, plus interest, costs and attorneys' fees as permitted by applicable law;

b. damages in an amount which this Court deems to be just and proper for emotional distress;

c. damages in an amount which this Court deems to be just and proper for punitive damages;

d. a permanent injunction prohibiting the Neighboring Landowners from violating Mr. Levin's civil rights in the future; and

e. such further relief as this Court deems to be just and proper.

## COUNT IV

### Mr. Levin v. All Defendants (Civil Conspiracy)

126. Mr. Levin incorporates paragraphs 1-125 by reference as if set forth fully herein.

127. A claim for civil conspiracy lies where two or more persons combine or agree to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose, and the conspirators act with malice.

128. The Municipal Defendants and the Neighboring Landowners combined or agreed with each other to do lawful and unlawful acts with the unlawful intent and purpose of injuring Mr. Levin by harassing him, improperly denying and/or delaying the issuance of a variance to which Mr. Levin was entitled, causing Mr. Levin to expend considerable sums in legal fees and otherwise, and attempting to force Mr. Levin to abandon his plans to develop his property.

129. The members of the Board of Supervisors acted in furtherance and facilitation of the conspiracy by opposing Mr. Levin's request for a variance before receiving an engineer's report or other necessary information; by presenting false and misleading information to the federal government and to Mr. Levin regarding the issuance of variances for construction in the flood plain; by opposing

Mr. Levin's application in proceedings before the Zoning Hearing Board without any legitimate legal or factual basis for such opposition; by intervening against Mr. Levin in the matter of *Bennett Levin v. Zoning Hearing Board of Upper Makefield Township*, Court of Common Pleas of Bucks County, No. 98-6152-18-5 without any legitimate legal or factual basis upon which to intervene; and by appealing to the Commonwealth Court the decision of the Court of Common Pleas in action No. 98-6152-18-5 without any legitimate legal or factual basis upon which to appeal.

130. The members of the Zoning Hearing Board acted in furtherance and facilitation of the conspiracy by deciding to deny Mr. Levin's request for a variance before the presentation of any evidence and without consideration of the merits of the application or the applicable law; by issuing a decision denying Mr. Levin's request for a variance that was without any legitimate legal or factual basis; and by meeting with Mr. Devlin to discuss Mr. Levin's application and formulate opposition thereto.

131. Upon information and belief, Mr. Harris and Harris & Harris acted in furtherance and facilitation of the conspiracy by assisting the Township in formulating its policy of denying all applications for variances for construction of new homes in the flood plain and in contriving bogus reasons to deny Mr. Levin's application, including the claim that the Property should be considered as a single unit even though it was bisected by River Road and under Pennsylvania law must be considered as two separate parcels.

132. The Neighboring Landowners acted in furtherance and facilitation of the conspiracy by opposing Mr. Levin's request for a variance in proceedings before the

Zoning Hearing Board; and by meeting with Gorring to discuss Mr. Levin's application and formulate opposition thereto.

133. The actions of the Municipal Defendants and the Neighboring Landowners in conspiracy with each other caused Mr. Levin to suffer damages in an amount in excess of $100,000.

134. In addition, the actions of the Municipal Defendants and the Neighboring Landowners in conspiracy with each other caused Mr. Levin to suffer emotional distress.

135. The actions of the Municipal Defendants and the Neighboring Landowners in conspiracy with each other were deliberate, willful, wanton and/or reckless and so outrageous as to warrant the imposition of punitive damages.

WHEREFORE, for the foregoing reasons, Mr. Levin requests this Court to enter judgment in his favor and against the Municipal Defendants and the Neighboring Landowners for:

a. compensatory damages in an amount in excess of $100,000, plus interest, costs and attorneys' fees as permitted by applicable law;

b. damages in an amount which this Court deems to be just and proper for emotional distress;

c. damages in an amount which this Court deems to be just and proper for punitive damages;

d. such further relief as this Court deems to be just and proper.

## COUNT V

### Mr. Levin v. All Defendants
### Abuse of Process

136. Mr. Levin incorporates paragraphs 1-135 by reference as if set forth fully herein.

137. A claim for abuse of process lies where the defendant has used legal process against the plaintiff primarily to accomplish a purpose for which the process was not designed and has caused harm to the plaintiff.

138. The Township, through its attorneys Mr. Harris, Mr. Sturn and Harris & Harris, used legal process against Mr. Levin in intervening against Mr. Levin in the matter of *Bennett Levin v. Zoning Hearing Board of Upper Makefield Township*, Court of Common Pleas of Bucks County, No. 98-6152-18-5.

139. The Township and its attorneys had no legitimate legal or factual basis upon which to intervene against Mr. Levin in the proceedings before the Court of Common Pleas.

140. The Township, through its attorneys, used legal process against Mr. Levin in appealing to the Commonwealth Court the decision of the Court of Common Pleas in action No. 98-6152-18-5 in which the Court of Common Pleas held that Mr. Levin's request for a variance must be issued.

141. The Township and its attorneys had no legitimate legal or factual basis upon which to appeal to the Commonwealth Court the decision of the Court of Common Pleas.

142. The Township, through its attorneys, intervened in the action before the Court of Common Pleas and appealed to the Commonwealth Court primarily for purposes for which such legal processes were not designed, including harassing Mr. Levin, improperly delaying the issuance of a variance to which Mr. Levin was entitled, causing Mr. Levin to expend considerable sums in legal fees, and attempting to force Mr. Levin to abandon his plans to develop his property.

143. The Township's abuse of the legal process was undertaken individually, collectively and in conspiracy with the other defendants herein.

144. Mr. Harris, Mr. Sturn and Harris & Harris are skilled, experienced and knowledgeable in matters of zoning and land use law.

145. Mr. Harris, Mr. Sturn and Harris & Harris knowingly used legal process to pursue a challenge of the Township to Mr. Levin's variance request that they knew was without probable cause and without a factual or legal basis.

146. In prosecuting the Township's challenge to Mr. Levin's requests for a variance, Mr. Harris, Mr. Sturn and Harris & Harris ignored and disregarded the report of the engineer hired by the Township and the controlling law.

147. The defendants' abuse of the legal process caused Mr. Levin to suffer damages in an amount in excess of $100,000.

148. In addition, the defendants' abuse of the legal process caused Mr. Levin to suffer emotional distress.

149. The defendants' abuse of the legal process was deliberate, willful, wanton and/or reckless and so outrageous as to warrant the imposition of punitive damages.

WHEREFORE, for the foregoing reasons, Mr. Levin requests this Court to enter judgment in his favor and against the Township and its attorneys for:

a. compensatory damages in an amount in excess of $100,000, plus interest, costs and attorneys' fees as permitted by applicable law;

b. damages in an amount which this Court deems to be just and proper for emotional distress;

c. damages in an amount which this Court deems to be just and proper for punitive damages;

d. such further relief as this Court deems to be just and proper.

## COUNT VI

### Mr. Levin v. All Defendants, Except Zoning Hearing Board Members (Violations of 42 Pa.C.S.A. § 8351)

150. Mr. Levin incorporates paragraphs 1-149 by reference as if set forth fully herein.

151. The Township Board of Supervisors procured, initiated, and/or continued the challenge to Mr. Levin's request for the issuance of a variance.

152. The Board of Supervisors' challenge to Mr. Levin's request for a variance was made in an intentional,

deliberate, wilful, wanton, reckless and/or grossly negligent manner and without probable cause.

153. The Board of Supervisors' challenge to Mr. Levin's request for a variance was made for a purpose other than obtaining an adjudication of the merits of Mr. Levin's request for a variance.

154. The Board of Supervisors rendered its decision to challenge Mr. Levin's request for a variance prior to reviewing the merits of his application and prior to receiving and reviewing the report of the engineer which it had hired to review Mr. Levin's application.

155. Upon receiving the report of its engineer, the Board of Supervisors ignored and disregarded the evaluation of the engineer and recommendation that the variance be granted. In doing so, the Board of Supervisors acted in an arbitrary, capricious and/or bad faith manner.

156. The Board of Supervisors' wrongful challenge to Mr. Levin's request for a variance was made individually, collectively and in conspiracy and with the other defendants herein.

157. The Solicitors for the Board of Supervisors, defendants Mr. Harris, Mr. Sturn and Harris & Harris represented the Township in its challenge to Mr. Levin's request for the issuance of a variance and thus procured, initiated and/or continued the baseless challenge to Mr. Levin's requested variance.

158. Mr. Harris, Mr. Sturn and Harris & Harris are skilled, experienced and knowledgeable in matters of zoning and land use law.

159. Mr. Harris, Mr. Sturn and Harris & Harris knowingly prosecuted the challenge of the Township to Mr. Levin's variance request that was without probable cause and without a factual or legal basis.

160. In prosecuting the Township's challenge to Mr. Levin's requests for a variance, Mr. Harris, Mr. Sturn and Harris & Harris ignored and disregarded the report of the engineer hired by the Township and the controlling law.

161. In intervening in the Township's challenge to Mr. Levin's request for a variance, the Neighboring Landowners procured, initiated and/or continued the civil proceeding.

162. The Neighboring Landowners acted without probable cause and without a factual or legal basis to challenge Mr. Levin's request for a variance.

163. In challenging Mr. Levin's request for the issuance of a variance, the Neighboring Landowners ignored and disregarded the reports of Mr. Levin's engineer and the Township's engineer. Moreover, the Neighboring Landowners ignored and disregarded the controlling law.

164. The Court of Common Pleas of Bucks County rendered an adjudication on the merits in favor of Mr. Levin.

165. As a result of the Defendants' wrongful use of civil proceedings, Mr. Levin has sustained substantial damages and attorneys' fees.

166. As a result of Defendants' wrongful use of civil proceedings, Mr. Levin has suffered emotional distress.

167. The Defendants' actions in procuring, initiating and/or continuing the use of civil proceedings for purposes other than securing an adjudication on the merits of the request for a variance and without probable cause or a factual or legal basis is mere intentional, deliberate, wilful, wanton, reckless and/or grossly negligent and so outrageous as to warrant the imposition of punitive damages.

WHEREFORE, for the foregoing reasons, Mr. Levin requests this Court to enter judgment in his favor and against Defendants for:

a. Compensatory damages in an amount in excess of $100,000, plus interest, costs and attorneys' fees as permitted by applicable law;

b. Damages in an amount which this Court deems to be just and proper for emotional distress;

c. Damages in an amount which this Court deems to be just and proper for punitive damages; and

d. Such further relief as this Court deems to be just and proper.

Respectfully submitted,

LEDGEWOOD LAW FIRM

/s/ Eric Zagar
Eric L. Zagar
1521 Locust Street
Philadelphia, PA 19102
(215) 731-9450

Dated: September 18, 2000

Attorneys for Plaintiff
Bennett Levin

UPPER MAKEFIELD TOWNSHIP
ZONING HEARING BOARD

In Re: Application of Bennett Levin

I. FINDINGS OF FACT

1. The Upper Makefield Township Zoning Hearing Board held hearings on the within application on January 29, March 3, March 19, March 31, April 9, May 12, June 2, and June 23, 1998. The Board met in public session on July 30, 1998 and voted unanimously to deny the request. All meetings were held in the Upper Makefield Township Building, 1076 Eagle Road, Newtown, Pennsylvania.

2. The Applicant Bennett Levin, bought the subject property by deed dated June 27, 1997. The present application was filed on November 24, 1997, less than five months later.

3. Bennett Levin lives at 2301 Cherry Street, Philadelphia, Pennsylvania. The subject property is a vacant lot of land on River Road in Upper Makefield Township, Bucks County, Pennsylvania. The Delaware River is the northeast boundary and the Delaware Division of the Pennsylvania Canal is the southwest boundary. Route 32 or River Road runs through the tract. The portion of the tract next to the River bears Bucks County Tax Parcel No. 47-9-70 and the portion next to the Canal bears Tax Parcel No. 47-9-57. The application refers to the property as a single lot containing 7.0176 acres.

4. The tract is located within the floodplain as delineated in the Newtown Area Joint Municipal Zoning Ordinance and its accompanying FEMA maps. While the underlying zoning is CM Conservation Management, the

property is subject to the Section 905 *Floodplain Districts* regulations.

Section 905.I.F.1 provides:

F. Overlay Concept.

1. The Floodplain District described herein shall be an overlay to the existing underlying districts as shown on the Zoning map. The provisions for the Floodplain District shall serve as a supplement to the underlying District provisions.

5. Zoning Ordinance Section 905.III.A describes and defines the components of the Floodplain District. It has generally been conceded throughout the hearing that the property is within the Floodplain Zoning District, and that the regulations do not permit the construction of new single family dwellings within that District. See Section 905.IV.A, Regulation of Uses. Applicant seeks a use variance from these regulations in order to construct a new single family dwelling with on-lot water and sewer facilities.

6. The Zoning Hearing Board rendered a decision on February 13, 1992 in a case involving this same property. In the 1992 application, a variance was sought to build a single family dwelling on this property. The requested use variance was denied. A copy of that decision which contains findings pertinent to the present application and which was available to anyone by inquiry at the Township Building, is attached hereto and incorporated herein as Appendix "A".

7. Applicant plans to fill a substantial portion of the tract in order to achieve a first floor elevation of 59.67 feet

above sea level. In order to obtain this elevation, Applicant's plans show a retaining wall and between 5 and 6 feet to fill. The flood waters in 1955 reached an elevation of 53.77 at the Washington Crossing Bridge, and that elevation is generally considered the floodplain elevation at the subject property. In this location, River Road has an elevation of 43 feet and the Towpath has an elevation of 51 feet.

8. The Applicant also demonstrated through his engineer, the length of time that it would take the River to rise to the 1955 flood elevation. Assuming that the River would rise in a flood event by the same rate as it did in 1955, it would take 26 hours for the water to rise from 35.5 feet to the 51 feet at the Towpath elevation. Applicants sought to prove that through various early warning systems and devices, they would have plenty of time to vacate their dwelling in the event of a flood similar to the 1955 flood.

9. Applicant offered evidence that he would be able to flood proof the well and septic system, that the house would be built to withstand all manner of flood pressures, that early warning devices would be constructed on the property to warn if the flood waters overtop the River bank, that radio and computer contact could be made with up-river measuring stations in order to keep the occupants of the premises fully informed of rising flood waters, that nothing would be stored upon the property that could float downstream to damage other property and that the residents would in fact comply with early warning signals and evacuate the premises in the event of flood water. The Board believes however that all of the early warning devices known to man cannot oblige a homeowner to leave his property if he is not inclined to do so.

10. Applicant's professional planner, E. Van Rieker, testified that the property was too small for most of the uses that were allowed under the Zoning Ordinance. In his opinion, the only reasonable use that could be made of the property was as a residential lot for a Use B-1, single family dwelling.

11. Another experienced community planner, Michael Frank, testified that he had prepared the Joint Zoning Ordinance which is applicable to these proceedings and that he had also consulted with upper Makefield Township on the preparation of its 1997 comprehensive plan.

12. Mr. Frank said that there are five basic reasons related to health, safety and welfare, generally cited as the basis for floodplain regulation. They are:

a. Undeveloped floodplain areas absorb and temporarily store flood water during flood events.

b. Undeveloped floodplain areas minimize the flood velocity and the flood stage height during storm events.

c. Structures within the floodplain face damage to themselves and create obstructions that then affect properties downstream, roads, bridges and the public in general.

d. The protection of floodplain areas avoids public expense in terms of constructing flood control devices and providing flood relief to persons and properties that are damaged during flood events.

e. The cumulative affect of continued development and the placement of obstructions in the floodplain

increase the frequency of flood events and affects the severity of flood events.

13. Of the various bases named above, Mr. Frank believed, as does the Zoning Hearing Board, that the cumulative affect of development within the floodplain, is extremely important when considering regulation.

14. Mr. Frank pointed out there are several sections of the Municipalities Planning Code dealing with floodplain provisions. First of all, there is Section 301, Subsection 1 which provides:

> A municipal comprehensive plan shall include a land use plan for the preservation of floodplains and other areas of special hazard.

In MPC Section 503.2 is the provision:

> Subdivision and land development ordinances may include provisions for insuring that land which is subject to flooding, subsidence or underground fires, either shall be safe for the proposed use or that these areas shall be set aside for uses that do not endanger life or property.

And MPC Section 603.b.5 provides:

> Zoning ordinances may be designed to preserve natural, scenic and historic values of the environment and to preserve forests, wetlands, aquifers and floodplains.

Mr. Frank also pointed out that in various subsections of MPC Section 605 having to do with zoning ordinances, we find:

> All uses of the same nature must be treated in a uniform manner within any zoning district except that special provisions may be made for areas identified as natural or artificial bodies of water, places of relatively steep slope or grade, areas of hazardous geological or topographical features, floodplain areas, agricultural areas, and other places having special character or use affecting or affected by their surroundings.

15. Mr. Frank also pointed to the Federal requirements in the Federal Flood Insurance Program requiring that municipalities include specific provisions in their zoning ordinance relating to floodplain protection. In addition, there is the Pennsylvania Floodplain Management Act of 1978 which requires that municipalities in the preparation of their zoning ordinances comply with the Federal Flood Insurance Program plus include specific provisions that exclude certain uses from floodplain areas.

16. Mr. Frank quoted from the Bucks County Planning Commission 1986 Natural Resources Plan as follows:

> Even development within the flood fringe while permitted by the National Flood Insurance Program, is discouraged by the Federal Emergency Management Agency. Filling in of the fringe areas can cause major flood storage loss, increasing downstream flood heights, changing drainage patterns and increasing the rate and amount of runoff. Such flood fringe development may also increase the magnitude and frequency of normally minor floods, increasing damage to existing structures.

17. Mr. Frank also stated that a 1982 study of the Bucks County Planning Commission called the Delaware River Corridor Study contained the following language:

> It is recommended that municipal floodplain and stormwater management programs go beyond the minimum standards of the National Flood Insurance Program and adopt ordinances which prevent further development of the 100 year floodplain and control the rate of stormwater runoff from all development. Finally, it should be remembered that if adequate floodplain areas are not left undeveloped, the devastating threat of floods will increase and consequently public pressures for expensive flood control structures will be great.
>
> Because the development of floodplain destroys or reduces the natural function and aesthetic qualities of these areas and pose a hazard to life and property, new development of a 100 year floodplain should be prohibited.

18. The standards set forth in the applicable Zoning Ordinance meet the enabling provisions contained within the National Flood Insurance Program, the FEMA regulations, the Pennsylvania Municipalities Planning Code, and the regulations promulgated by the Bucks County Planning Commission.

19. With respect to the matter of a use variance and the requirements set forth in the MPC Section 910.2, Mr. Frank testified as follows, which testimony was accepted as creditable by the Zoning Hearing Board:

a. There is nothing unique or peculiar with regard to the subject property. The floodplain regulations as contained in the Zoning Ordinance extend the entire

length of Bucks County and also extend the entire eastern border of Upper Makefield Township. Each property is treated alike.

b. With respect to whether the property can be developed in strict conformity with the Zoning Ordinance, Mr. Frank testified that there were certain allowable uses in the CM Conservation Management Zoning District which could be developed on the property. Among them were forestry and agriculture or horticulture. Mr. Frank said that a number of crops could be grown on the subject property, all of which would return a substantial amount of revenue per year. They were raspberries, strawberries, blueberries, blackberries, cantaloupes, pumpkins, bell peppers, cucumbers, asparagus, tomatoes, and Douglas Firs.

c. Mr. Frank believed that there was no unnecessary hardship.

d. Mr. Frank opined that the grant of a variance so as to construct a substantial dwelling would alter the essential character of the neighborhood because the additional development of the floodplain and incremental placement of obstructions in the floodplain would be a concern to the neighbors with regard to future flooding conditions.

e. With regard to whether the variance requested will represent the minimum variance needed to afford relief, Mr. Frank thought that it would not. He felt the minimum variance would be a variance with respect to lot size so as to permit uses A1 and A3 having to do with forestry, agriculture, and horticulture.

20. On the question of whether or not the property can be put to a reasonable use without the grant of a variance in order to construct a dwelling on it, the Zoning Hearing Board heard from Applicant's witnesses, E. Van Reiker who said that the variance was necessary, Samuel R. Willard who said that the property had little commercial value for any type of forestry operation, Gerald White, a farmer, who said that the property was too small to farm, and Dr. William E. Palkovics, a soil scientist, who testified that the property was not suitable for agriculture. The Township's witnesses were Michael Frank, land planner, who testified that the property could be used for forestry, agriculture or horticulture, Michael Fournier, the Penn State Extension Agent, who said that the property could be used for various types of agricultural operations such as fruit, vegetables and flowers and Darryl Tribue of the US Department of Agriculture, who said that the trees on the property could be used for a small scale forestry operation. Taking all of this testimony into consideration, the Board finds as a fact that a reasonable use can be made of the property without the grant of a variance.

21. The three individual parties, John Devlin, Jonathan Lamm and Tom Kovacevich, are all owners of adjacent property. They testified that they had strenuous objection to the grant of the use variance and that constructing a dwelling on the subject property would have an adverse affect on the community. In addition, Upper Makefield Township, by its solicitor, called witnesses who testified in opposition to the grant of the variance. The Township's position throughout the case has been that there was no need to grant a variance in order to enable the owner to make a reasonable use of the property as zoned.

22. The Board was impressed with the credibility of Township witnesses Michael Fournier and Darryl Tribue. Mr. Fournier went into great detail concerning the cost of operating a small scale agricultural use on the property, and Mr. Tribue was very convincing with respect to the number of trees on the site and the use that could be made of them. This testimony was buttressed by photographs received in evidence at the hearing on June 23, 1998 which indicate a substantial number of large trees are on the property.

23. The Applicant did prepare and file a HEC-2 Study in compliance with the Zoning Ordinance.

## II. CONCLUSIONS OF LAW

1. The proposed on-lot septic system and well would violate the Zoning ordinance Section 905.ICV.C.5. The on-lot septic system being in the floodplain as proposed would also violate the Township's Act 537 Plan with regard to wastewater disposal.

2. The property could be put to various other uses rather than as a building lot. The other uses could be in the form of various types of agriculture, horticulture or forestry. The property could be used as a nursery similar to an existing nursery now in operation in neighboring Solebury Township.

3. The very large, almost mansion-like dwelling proposed by the Applicant, is not what is meant by the least modification possible of the Ordinance in question. There are a number of other lesser variances which would also allow for a reasonable use of the property. They might be a much smaller structure for use as a boat house or a

much smaller summer home that could be elevated in some manner.

4. The Zoning Hearing Board concludes that the proposed dwelling with the associated fill would cause an increase in flood elevation a the time of a 100 year flood of six inches. The Board also concludes that the velocity of the flood waters would be similarly increased.

5. Section 905.IV.A lists the uses which are permitted by right in a Floodplain District provided that the use is also permitted within the underlying Zoning District. The permitted uses are:

A. Permitted Uses

1. Agricultural uses, such as general farming, pasture, grazing, outdoor plant nurseries, horticulture, truck farming, forestry, sod farming, and wild crop harvesting;

2. Public and private recreational uses and activities, such as parks, day camps, picnic grounds, golf courses, boat launching and swimming areas, hiking and horseback riding trails, wildlife and natural preserves, game farms, fish hatcheries, and hunting and fishing areas;

3. Accessory residential uses, such as yard areas, gardens, play areas, and pervious parking areas;

4. Accessory commercial uses, such as yard areas and pervious parking and loading areas.

B. Uses Permitted by Special Exception

1. Utilities, public facilities, and improvements, such as railroads, streets, bridges, transmission lines, pipe lines, and other similar or related uses;

2. Functionally dependent uses and activities, such as marinas, docks, wharves, piers, etc.;

3. Temporary uses, such as circuses, carnivals, and similar activities, provided they are permitted in the Zoning District in which the property is located;

4. Where permitted in the Zoning District in which the property is located, storage of materials and equipment; provided that such materials and equipment are not buoyant, flammable, explosive, or polluting, and are not subject to major damage by flooding; and provided further that such material and equipment is firmly anchored to prevent flotation or movement.

6. With respect to the matter of health and safety, from the testimony presented, as well as from the Zoning Board members knowledge of the area, the subject property and the road in front of it, floods every several years. The problem that is created is that there is no way to get a vehicle onto the property once River Road fills with water and ice. The Zoning Board also believes that the testimony that the Canal towpath would serve as an access in times of flood is not to be believed. The towpath itself is occasionally covered with water and according to the testimony received, it has a width of only eight feet which in times of

flood would not be adequate for access by a motor vehicle. The risk as seen as by the Board is that emergency personnel and equipment would be obliged to attempt to rescue persons at the residence and would thus expose themselves to great danger in attempting to reach the elevated portion of the property on which the house would be built. There is no reasonable, sensible way to approach the property from existing roadways.

7. During flooding in 1996, the road in front of the property was under two feet of water and a woman motorist died as a result of being trapped in the flood water. Exhibit B to Section 905.3 and 905.4, found on page IX-32 of the Zoning Ordinance, provides that all flood waters are to pass without overtopping any roads.

8. The Zoning Hearing Board believes that the Applicant, Bennett Levin, was aware of the floodplain regulations when he purchased the subject property in June, 1997. The Zoning Hearing Board also believes that Mr. Levin should have been aware of the former 1992 decision in this case where the Zoning Hearing Board had already denied a variance to build a house on the exact same property.

9. The proposal to place 5 to 6 feet of fill on the property is in violation of Zoning Ordinance Section 905.IX.A which prohibits any fill within the Floodplain District.

10. There is nothing unique about the subject property. It is located along the Delaware River within the Floodplain District in exactly the same fashion as other River properties extending the entire length of the Township.

11. Since there is nothing unique about the subject property, there is no hardship associated with it and the Zoning Hearing Board further believes that it has been established that a reasonable use can be made of the property.

12. The Applicant can reasonably be charged with knowledge of the Floodplain Regulations and the prior 1992 decision of the Zoning Hearing Board.

13. The essential character of the neighborhood would be adversely affected should the dwelling be constructed as proposed. The dwelling and associated fill would cause an increase in the height and velocity of flood waters, all of which would be detrimental to the public welfare.

14. Applicant is not seeking the minimum variance. The large dwelling with retaining wall and large amounts of impervious surface far exceed the minimum variance that would provide relief in this case.

15. The Board concludes that River Road in front of the property is 13 feet under water at the time of the 100 year flood. The Canal in the rear is 3 feet under water in the 100 year flood. All of this would make it virtually impossible to conduct rescue and emergency operations in the event of a flood of that magnitude. Similarly, the evidence received by the Board shows that River Road in front of the property is under 8 feet of water in the event of a 25 year flood. This is in direct violation of the Zoning Ordinance.

16. Additional sections of the Zoning Ordinance which would be violated by the proposed plan are: 902.V.2.B, 903.B.1, 905.1.A.1, 2 and 4, and 905.IV.A.

## III. DISCUSSION

1. The Zoning Hearing Board is aware of the Commonwealth Court opinion in the case of *Ruddy vs. Lower Southampton Township*, 669 A.2d.1051 (1995). In that case, the Township zoning hearing board denied relief to the owner of a lot within a floodplain in Lower Southampton Township. The Bucks County Court of Common Pleas affirmed the Zoning Hearing Board but the Commonwealth Court reversed and directed that the necessary permits be granted. This Board believes that there are certain factual and legal distinctions between the *Ruddy* case and the present case. They are:

a. The property in the *Ruddy* case was a subdivided lot 75 feet by 120 feet for a total lot area of 9,000 square feet.

b. There were at least five neighboring houses built on lots of a similar size all of which were created by the same subdivision and all of which were in the floodplain.

c. The only possible use that could be made of the *Ruddy* property was for a single family dwelling.

d. When the Township received the application from *Ruddy*, it sent it to FEMA and asked for a review. FEMA wrote back saying that it had no objection to the proposed use.

e. The Township relied exclusively on the theory that to build another house along this street in this subdivision would be contrary to the public interest.

f. *Ruddy* bought the lot at tax sale for $900.00 while a conforming lot in the community would be worth $40,000.00.

The differences between *Ruddy* and the present case are obvious. In the *Ruddy* situation, there was a further complication in that the *Ruddy* property was needed to serve as a drainage swale for stormwater to reach the creek. The Commonwealth Court ruled that if the Township needed to hold the *Ruddy* property from development so as to provide a waterway, the Township should condemn the property.

With respect to the relevancy of the price paid for the property, the Commonwealth Court said that where a landowner purchases property with knowledge of the property's condition and zoning classification, such a landowner's hardship is self-inflicted only where he has paid a high price for the property because he assumed that a variance which he anticipated would justify that price. This Board has no evidence on the record to show the fair market value of the subject property. Under the circumstances, the Board cannot say whether Mr. Levin said a high price or a low price for the property. But what the Board can say is that the Applicant is charged with the knowledge concerning the Zoning Regulations, the Floodplain Regulations, and the price decision of this Board. *See Appeal of Gro*, 269 A.2d.876 (1970) where the Pennsylvania Supreme Court aptly said:

> When the purchaser acquired the property he did so with the conditions of (the now claimed) economic hardship staring him in the face, and he cannot be heard to complain.

## IV. DECISION

AND NOW, this 13th day of August, 1998, upon consideration of the foregoing Findings of Fact, Conclusions

of Law and Discussion, it is the decision of the Upper Makefield Township Zoning Hearing Board that the use variance to permit the construction of a single family dwelling as requested in the application is denied and refused.

UPPER MAKEFIELD
TOWNSHIP ZONING
HEARING BOARD

/s/ Barbara Hirst
Barbara Hirst

/s/ Eric Fisher
Eric Fisher

/s/ R.L. Gorring
Robert L. Gorring

(3)

Supreme Court, U.S.
FILED
NOV 12 2004
OFFICE OF THE CLERK

No. 04-500

IN THE

# Supreme Court of the United States

BENNETT LEVIN,

*Petitioner,*

*v.*

UPPER MAKEFIELD TOWNSHIP, BUCKS COUNTY, PENNSYLVANIA; ROSE MARIE SAUTER; CONRAD BALDWIN; WILLIAM GUNSER; EDWARD X. FORD; JOHN TITTERTON; LAWRENCE SALTZMAN; JOHN WALSH; BARBARA HIRST; ROBERT GORRING; ERIC FISCHER; MICHAEL FRANK; STEVEN HARRIS, ESQUIRE; GREGORY STURN, ESQUIRE; HARRIS & HARRIS, ATTORNEYS,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the Third Circuit Court of Appeals correctly applied the "shocks the conscience" standard to analyze a substantive due process claim brought pursuant to 42 U.S.C. § 1983 arising from a zoning dispute.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| INTRODUCTION | 1 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR DENYING THE PETITION | 6 |
| A. The Standard Set Forth In *County Of Sacramento v. Lewis* Provides The Theoretical Construct For All Section 1983 Substantive Due Process Claims, Including Zoning Claims, And There Is Therefore No Split In The Circuits That Must Be Addressed | 6 |
| B. Since This Court's Opinion in *City of Sacramento v. Lewis*, the Circuit Courts Have Consistently Demonstrated A Commitment To An Extremely Restrictive Application of Substantive Due Process Analysis in the Land-use Context | 10 |
| CONCLUSION | 15 |

## TABLE OF AUTHORITIES


*Federal Cases:* **Page**

*Bello v. Walker*, 840 F.2d 1124 (3d Cir. 1988) . . . . . 10

*Bowers v. The City of Flint*, 325 F.3d 758 (6th Cir. 2003) . . 13

*Breithaupt v. Abram*, 352 U.S. 432 (1957) . . . . . 7

*Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 263 F.3d 627 (6th Cir. 2001) . . . . . 11

*City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188 (2003) . . . . . 1, 7, 8, 9, 11

*Collins v. City of Harker Heights*, 503 U.S. 115 (1992) . . . . 7

*County of Sacramento v. Lewis*, 523 U.S. 833 (1998) . . . . . 1, 6, 7, 8, 10, 11

*Crider v. Board of County Commissioners of Boulder*, 246 F.3d 1285 (10th Cir. 2001) . . . . . 12

*Garvie v. City of Fort Walton Beach*, 366 F.3d 1186 (11th Cir. 2004) . . . . . 12

*George Washington University v. District of Columbia*, 318 F.3d 203 (D.C. Cir. 2003) . . . . . 12

*Iowa Coal Mining Co., Inc. v. Monroe County*, 257 F.3d 846 (8th Cir. 2001) . . . . . 12

*Natale v. Town of Ridgefield*, 170 F.3d 258 (2d Cir. 1999) . . . . . 12, 13, 14

*Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992) 11

*Rochin v. California*, 342 U.S. 165 (1952) . . . . . 7

*Simi Investment Co. v. Harris County, Tex.*, 236 F.3d 240 (5th Cir. 2000) . . . . . 12

*Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430 (4th Cir. 2002) . . . . . .12, 14

*United Artists v. Township of Warrington*, 316 F.3d 392 (3d Cir. 2003) . . . . . 1, 8, 10

**TABLE OF AUTHORITIES** — *(Continued)*


*Federal Cases:* **Page**

*United States v. Salerno*, 481 U.S. 739 (1987) . . . . . 7

*Whitley v. Albers*, 475 U.S. 312 (1986) . . . . . 7

**STATUTES**

42 U.S.C. § 1983 . . . . . 1

53 P.S. § 10910.2 . . . . . 4

**MISCELLANEOUS**

Eric Jenkins, *Challenging Land Use Actions Under Section 1983*, 74 Wash. L. Rev. 853 (1999) . . . . . 13

## INTRODUCTION

Respondents Upper Makefield Township, Bucks County, Pennsylvania, Rose Marie Sauter, Conrad Baldwin, William Gunser, Edward X. Ford, John Titterton, Lawrence Saltzman, John Walsh, Barbara Hirst, Robert Gorring, Eric Fisher, Michael Frank, Steven Harris, Esquire, Gregory Sturn, Esquire, and Harris & Harris, Attorneys (collectively referred to herein as "Respondents") respectfully request that this Court deny Petitioner Bennett Levin's Petition for a Writ of Certiorari.

Petitioner is under the misimpression that every action of a municipality to which he takes offense gives rise to a claim for deprivation of due process under 42 U.S.C. § 1983 ("Section 1983"). This Court has clearly stated that this is not so, and that "the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm." *County of Sacramento v. Lewis*, 523 U.S. 833, 848 (1998). In order to support a due process claim, the conduct complained of must "shock the conscience." *Id.* at 846. Only conduct intended to injure and unjustified by a legitimate government interest will rise to a conscience-shocking level. *Id.* at 849. This analysis applies equally as the conceptual framework for all substantive due process claims, including zoning claims like the one at Bar. *See, e.g., City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 198 (2003); *United Artists v. Township of Warrington*, 316 F.3d 392, 401-02 (3d Cir. 2003).

Further, if, as Petitioner suggests, differing theoretical constructs should apply to different types of substantive due process claims, the jurisprudence surrounding these claims will be perpetually uncertain and muddied and the federal courts would be transformed into super zoning boards. The application of *Lewis* to all substantive due process claims under Section 1983 is dictated by the case's plain language, and provides much needed consistency to due process claims such as those raised by Petitioner. The fact that Petitioner was unable to present evidence that met the constitutional standard imposed by *Lewis* is not sufficient reason to revisit the well-considered theoretical construct that case set forth.

In an attempt to further confuse the issue, Petitioner cites to numerous pre-*Lewis* and pre-*City of Cuyahoga Falls* cases in support of the proposition that the Circuit Courts remain split as to the standard of review applicable to a substantive due process claim in the land-use context. Given this Court's exhaustive analysis of the contours of a Section 1983 action in *Lewis*, the fact that there may have been different standards applied prior to that case is of no moment. Indeed, *Lewis* settled the question and *City of Cuyahoga Falls* made clear that *Lewis* applies in a land-use context. Further, since *Lewis*, the Circuit Courts enjoy far more uniformity in their approach to substantive due process claims than Petitioner would like to suggest. Indeed, the cases reveal a uniform commitment on the part of the Circuit Courts to engage in circumspect review of substantive due process claims and to limit the application of the substantive due process doctrine to only the most extreme and egregious of cases. Such commitment on the part of the Circuit Courts also demonstrates a consonant recognition of the distinction between those cases properly resolved under state law, and those cases egregious enough to create a federal due process violation.

## STATEMENT OF THE CASE

In June 1997, Petitioner purchased approximately seven acres of undeveloped land (the "Property") in Upper Makefield Township (the "Township") situated between the Delaware River and the Delaware Division of the Pennsylvania Canal. (App. 35.)[1] The Property is located in a flood plain. (App. 2.) Petitioner knew at the time he purchased the Property that the prior owner had sought a zoning variance from the Zoning Hearing Board ("ZHB") in order to develop the Property and that the variance had been denied. (App. 35; App. 3.)

Before he purchased the Property, Petitioner claims that Township Code Enforcement Officer David Kuhns ("Kuhns") informed him that there was no Township policy against development of the Property. Kuhns allegedly told Petitioner that

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1 Citations to Petitioner's Appendix, containing the opinions of the United States Court of Appeals for the Third Circuit and The United States District Court for The Eastern District of Pennsylvania, shall be to "App. ____."

he would need to comply with the Township's Joint Municipal Zoning Ordinance ("JMZO"). (App. 3.)

In particular, Petitioner had to comply with three zoning requirements in order to obtain the variance he sought, including (1) the criteria set forth in the specific Zoning District; (2) the criteria contained in the floodplain overlay (Section 905); and (3) the five-pronged test set forth in Section 10910.2 of the Municipalities Plan Code ("MPC") and incorporated into the JMZO.[2] With respect to the JMZO, it not only addresses the criteria for the "CM – Conservation Management" Zoning District, in which the Property lies, but it also contains a Floodplain District overlay – Section 905 – which applies to every property located in a floodplain and contains additional criteria which must be met in addition to the requirements in other normal zoning districts. (App. 3.)

The purpose of Section 905 is "to prevent the loss of property and life, the creation of health and safety hazards, the disruption of commercial and government services, the extraordinary and unnecessary expenditure of public funds for flood protection and relief, and the impairment of the tax base." (App. 3-4.) Section 905 itemizes a number of considerations the ZHB must consider when deciding whether to grant a variance application for construction in the floodplain. Among the many considerations outlined are the following relevant portions:

- The danger to life and property due to increased flood heights or velocities caused by encroachments. No special exception or variance shall be granted for any proposed use, activity, or development that will cause any increase in the one hundred (100) year flood levels in the Floodplain District as delineated in the Flood Insurance Study referenced in Section 905.III.A.1.

- The safety of access to the property by ordinary and emergency vehicles in times of flood.

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2 Petitioner does not dispute the recitation of the applicable zoning requirements set forth in the Third Circuit's opinion.

(App. 4.)

In addition to the criteria for obtaining a variance set forth in Section 905, the JMZO also requires that "variances shall be in accordance with the provisions of the Pennsylvania Municipalities Planning Code." (App. 4.) In deciding whether to grant a variance, Section 10910.1 of the MPC provides:

> The board may grant a variance, provided that all of the following findings are made where relevant in a given case:
>
> (1) That there are unique physical circumstances or conditions . . . peculiar to the particular property . . .
>
> (2) That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance . . .
>
> (3) That such unnecessary hardship has not been created by the appellant.
>
> (4) That the variance, if authorized, . . . [would not] be detrimental to the public welfare.
>
> (5) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

53 P.S. § 10910.2. These requirements are mandated by state law and the JMZO. (App. 4-5.)

On November 24, 1997, Petitioner submitted a zoning variance application and requested a hearing before the ZHB. (App. 36.) The Township Board of Supervisors held a public meeting on December 17, 1997 to discuss the application and authorized the Township solicitor to oppose the application before the ZHB. (App. 36-37.) The Township Board of Supervisors took up the application again at its January 21, 1998 meeting, and again authorized the Township solicitor to oppose the application. (App. 8.) The Township Board of Supervisors expressed concerns about health and safety in reaching its decision. (App. 37.)

The ZHB conducted eight evidentiary hearings on the application, at which both Petitioner and Township presented evidence. (App. 8.) Petitioner presented evidence as to his compliance with Section 905. (App. 8.) In response, the Township presented evidence at the hearings with respect to the health and safety risks associated with Petitioner's requested variance. (App. 8-9.) Although Petitioner was never able to present evidence to prove it, he later claimed that the ZHB had engaged in improper *ex parte* communications during the hearing process. (App. 20-21.) On July 30, 1998, the ZHB voted unanimously to deny Petitioner's application. (App. 10.)

As is his right under Pennsylvania law, Petitioner filed an appeal of the ZHB determination with the Court of Common Pleas of Bucks County, Pennsylvania. The Township intervened in that action to oppose the appeal. (App. 10.) The Court of Common Pleas reversed the ZHB determination and the Pennsylvania Commonwealth Court affirmed the decision of the Common Pleas Court. (App. 10.) The Township then sought allocatur from the Pennsylvania Supreme Court which was denied on November 9, 2000 without opinion. (App. 10.) Petitioner, therefore, has obtained complete relief from the Pennsylvania state courts and was successful in obtaining his variance to permit the development of the Property.

While the state court proceedings were pending, Petitioner applied for a foundation permit at the Property. The issuance of the permit was stayed until resolution of the then pending appeals. (App. 24.) The building permit was issued in February 2002, one week after Petitioner paid the building permit fee. (App. 24.)

Also while the state court proceedings were pending, Petitioner filed this action against the Township, the Board of Supervisors, the ZHB members and the Township solicitors in the United States District Court for the Eastern District of Pennsylvania. (App. 10-11.) Pertinent to the instant Petition for Certiorari, Petitioner claimed that the Township, the Board of Supervisors, the ZHB members and the Township solicitors violated his substantive due process rights pursuant to Section 1983. (App. 11.) The District

Court granted summary judgment in favor of defendants on February 25, 2003. (App. 12.)

Petitioner appealed to the United States Court of Appeals for the Third Circuit. On March 8, 2004, the Third Circuit Court affirmed the grant of summary judgment. In doing so, the Third Circuit Court expressly adopted this Court's holding in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), and imposed a "shocks the conscience" standard to Petitioner's claims. In particular, the Third Circuit Court held that none of the actions taken by Respondents could be deemed to have met this standard. In fact, the court concluded that 1) the representations made by Kuhns were accurate; 2) the stated health and safety concerns of the Board of Supervisors were legitimate and, "on this record, the township's acquiescence to such building would have been shocking;"[3] 3) the Board of Supervisors would have been "derelict" had they not voted to oppose the application given the health and safety concerns; 4) Petitioner did not present evidence to show that the ZHB engaged in improper *ex parte* communications; and 5) the delay in issuing the permit was at most a "tale of overbearing conduct," and not conduct that shocked the conscience. (App. 17-25.)[4]

## REASONS FOR DENYING THE PETITION

### A. The Standard Set Forth In *County Of Sacramento v. Lewis* Provides The Theoretical Construct For All Section 1983 Substantive Due Process Claims, Including Zoning Claims, And There Is Therefore No Split In The Circuits That Must Be Addressed.

Petitioner's assertion that there is a split in the Circuits with respect to the appropriate standard to apply to a Section 1983 case arising from the actions of a zoning board ignores the clear pronouncements of this Court in *County of Sacramento v. Lewis*,

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3 Indeed, the emergency access roads and a portion of the Property flooded during this past Fall's hurricane season.

4 Interestingly, for all of his complaint regarding delay, after receiving the building permit in February 2002, Petitioner still has not commenced construction of his house at the Property. (App. 11.)

523 U.S. 833 (1998) and *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188 (2003). Given that this Court has adopted the *Lewis* standard in *City of Cuyahoga Falls*, a land-use case, there is no credible argument that certiorari should be granted to address a supposed Circuit split prior to the *City of Cuyahoga Falls* opinion. Tellingly, however, Petitioner does not even cite the *City of Cuyahoga Falls* case in his Petition. Thus, it is irrelevant that the Circuit Courts used somewhat different language in defining the type of conduct that rises to the level of a substantive due process claim in a land-use case prior to the *City of Cuyahoga Falls* case because that case has definitively settled the issue.

In *Lewis*, the Court determined that, in order to provide the basis for a Section 1983 action, the state action at issue must have been arbitrary and capricious to such a degree that it shocks the conscience. *Lewis*, 523 U.S. at 846-47. In that case, a police officer engaged in a high speed pursuit of a motorcycle which caused the death of the motorcycle passenger. The Court held that in those circumstances, "only a purpose to cause death unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation." *Id.*

As this Court explained in *Lewis*, due process is meant to protect against arbitrary government action. *Id.* at 845-46. In cases dealing with executive action. the Court has ruled that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *Id. (quoting Collins v. Harker Heights*, 503 U.S. 115, 129 (1992)). The Court also noted that it has found due process violations since 1952 only where "the cognizable level of executive abuse of power . . . [is] . . . that which shocks the conscience." *Id.* at 846-47 *(citing Rochin v. California*, 342 U.S. 165, 172-73 (1952); *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957); *Whitley v. Albers*, 475 U.S. 312, 327 (1986); *United States v. Salerno*, 481 U.S. 739, 746 (1987); *Collins*, 503 U.S. at 128). Thus, as the Court explained in *Lewis*, it is well-established that an action by the government will not be deemed to be arbitrary in a constitutional sense unless it rises to the level of shocking the conscience.

The *Lewis* standard is not rigid and provides the courts with the flexibility to evaluate the factual circumstances in which the challenged action occurred. Indeed, whether a particular action "shocks the conscience" will be largely dependent on the facts and context in which the action was taken. *United Artists v. Township of Warrington*, 316 F.3d 392, 399-400 (3d Cir. 2003). Thus, "deliberate indifference that shocks the conscience in one environment may not be so patently egregious in another, and . . . [the] . . . concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking." *Lewis*, 523 U.S. at 850.

Petitioner's real complaint appears to be that he does not like the legal determination that the relatively benign facts he presented to the District Court simply do not rise to the level of a due process violation. Petitioner complains that under the "shocks the conscience" standard, plaintiffs will not be able to obtain redress for improper actions of zoning boards and that zoning boards will therefore have "*carte blanche* to infringe upon property rights." (Petition for Certiorari at 9.) Melodrama aside, Petitioner fails to appreciate that not all improper actions rise to the level of constitutional violations. Indeed, this Court clearly recognized that a plaintiff must meet a high bar in order to show a constitutional violation: "It should not be surprising that the constitutional concept of conscience-shocking duplicates no traditional category of common-law fault, but rather points clearly away from liability, or clearly points toward it, only at the ends of the tort law's spectrum of culpability." *Lewis*, 523 U.S. at 848. Thus, "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *Id.* at 849. Petitioner simply did not meet his burden of proof to show that the Respondents behaved in a manner that would shock the conscience. Not every misdeed results in a due process violation.

If there was any doubt as to the breadth of *Lewis* and the principles expressed in that case, this Court laid it to rest in *City of Cuyahoga Falls*. In *City of Cuyahoga Falls*, the city submitted a

facially neutral referendum on the ballot calling for the repeal of a municipal housing ordinance which the plaintiffs claimed was a violation of the Equal Protection Clause, the Due Process Clause and the Fair Housing Act. 538 U.S. at 191. While the formal petition for a referendum was pending before the City, the city engineer denied the plaintiffs' permit request, which the plaintiffs claimed was a substantive due process violation. *Id.* at 192. Reversing the Sixth Circuit Court of Appeals that had found a constitutional violation, this Court held that the "city engineer's refusal to issue the permits while the petition was pending in no sense constituted egregious or arbitrary government conduct." *Id.* at 198. In support of this holding, the Court cited *Lewis* and the extensive analysis of the contours of due process contained in that opinion. *Id.* This Court, therefore, has already applied the *Lewis* analysis and standard to a determination of whether or not a zoning action taken by a municipality violated the Due Process clause, and, if there ever was any question of the applicability of *Lewis* to such cases, this Court has definitively resolved any lingering confusion. Despite the clear import of this decision, Petitioner did not even cite it to this Court in his Petition.

Petitioner's claim that there is a split in the Circuits as to the proper standard to be applied when assessing a due process violation in the zoning context disregards *Lewis* and completely ignores this Court's holding in *City of Cuyahoga Falls*. Indeed, in support of his position that there is a split in the Circuits, Petitioner cites to twelve cases that were decided before *Lewis*. The seven post-*Lewis* cases cited by Petitioner were decided prior to the *City of Cuyahoga Falls* case, and therefore do not take into consideration the import of that case. Since the *City of Cuyahoga Falls* case was decided by this Court, no Circuit Court has held that any test other than shocks the conscience should be used in a land-use due process case. Now that this Court has reiterated that the *Lewis* standard applies in the land-use context, the argument that there is a split in the Circuits prior to the *City of Cuyahoga Falls* case on this issue is irrelevant.

**B. Since This Court's Opinion in *City of Sacramento v. Lewis*, the Circuit Courts Have Consistently Demonstrated A Commitment To An Extremely Restrictive Application of Substantive Due Process Analysis in the Land-use Context.**

Petitioner cannot successfully argue that there is any split in the Circuits after this Court's ruling in *Lewis*. Indeed, it is readily apparent that the Circuit Courts enjoy far more uniformity in their approach to substantive due process claims than Petitioner suggests. Only the most egregious conduct can result in a substantive due process violation.

Prior to *Lewis*, there was some confusion as to the proper standard to be applied to substantive due process claims under Section 1983. In the Third Circuit, the Court had applied a very liberal standard to such claims prior to *Lewis*, finding a violation of substantive due process where the state action was "arbitrary, irrational, or tainted by improper motive." *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir. 1988). The Third Circuit Court, however, revisted this standard in light of *Lewis* and overruled the prior case law that had applied it. *United Artists v. Township of Warrington*, 316 F.3d 392, 394 (3d Cir. 2003). In *United Artists*, the Third Circuit Court noted that the *Bello* test "cannot be reconciled with *Lewis's* explanation of substantive due process analysis . . . The 'shocks the conscience' standard encompasses 'only the most egregious official conduct.'" *Id.* at 400 (*citing Lewis*, 523 U.S. at 846). The *United Artists* Court concluded that there was "no reason why the present case should be exempted from the *Lewis* shocks-the-conscience test simply because the case concerns a land use dispute." *Id.* at 401.

Critical to the *United Artists* Court's decision was the Court's unwillingness to take on the role of a "zoning board of appeals." *Id.* at 402. Noting that "every appeal by a disappointed developer from an adverse ruling of a local planning board involves some claim of abuse of legal authority," the *United Artists* Court stated that "[l]and-use decisions are matters of local concern and such disputes should not be transformed into substantive due process claims based only on allegations that government officials acted with 'improper' motives." *Id.*

Although Petitioner would have the Court believe that there is a split in the Circuits on the applicability of *Lewis* to land-use cases, this is not the case. Indeed, the post-*Lewis* cases that Petitioner cites are in accord with the *United Artists* Court in requiring extreme conduct before finding a due process violation, and in resisting the invitation to become "super zoning boards."

Further, although Petitioner cites extensively to *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1216 (6th Cir. 1992) to support his argument that there is confusion in the Circuits as to the proper standard to be applied in land-use cases, Petitioner fails to acknowledge that *City of Cuyahoga Falls*, also arising from the Sixth Circuit, overrules *Pearson* to the extent it conflicts with *Lewis*.[5] In *City of Cuyahoga Falls*, the Sixth Circuit had applied a "rational basis" test to evaluate the legislative conduct of the City, and found that the plaintiffs had presented sufficient evidence to prevail on summary judgment on the substantive due process claim. *Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 263 F.3d 627, 643-44 (6th Cir. 2001), *rev'd in part, vacated in part*, 538 U.S. 188 (2003). This Court, however, expressly rejected this analysis in favor of the *Lewis* standard, stating that "[w]e need not decide whether respondents possessed a property interest in the building permits, because the city engineer's refusal to issue the permits while the petition was pending in no sense constituted egregious or arbitrary government conduct." *City of Cuyahoga Falls*, 538 U.S. at 198 (*citing Lewis*, 523 U.S. at 846). Thus, to the extent that *Pearson* is inconsistent with *Lewis*, this Court made clear that *Lewis* controls.

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5 In *Pearson*, the Sixth Circuit Court adopted the rational basis standard only for land-use decisions it characterized as legislative. *Pearson*, 961 F.2d at 1223. With respect to land-use decisions it characterized as administrative, the *Pearson* Court adopted the "shocks the conscience" standard. *Id.* at 1222. In support of its decision to adopt the "shocks the conscience" standard, the Court found the standard "emphasize[d] the degree of arbitrariness required to set aside a zoning decision by a local authority – – and . . . underscore[d] the overriding precept that 'arbitrary and capricious' in the federal substantive due process context means something far different than in state administrative law." *Id.*

In the post-*Lewis* era, other Circuits have recognized the extremely circumspect nature of substantive due process review. *See, e.g., Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir. 1999)(finding substantive due process violated only where governmental conduct qualifies as outrageously arbitrary); *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430, 440 (4th Cir. 2002)(finding a substantive due process claim supported only where conduct "fall[s] beyond the outer limits of legitimate governmental action"); *Simi Inv. Co. v. Harris County, Tex.*, 236 F.3d 240, 249 (5th Cir. 2000)(finding substantive due process analysis appropriate in only those cases where the government arbitrarily abuses its power); *Crider v. Board of County Comm'rs of Boulder*, 246 F.3d 1285, 1289 (10th Cir. 2001)(finding that substantive due process requires more than simply erroneous behavior on the part of the government); *Garvie v. City of Fort Walton Beach*, 366 F.3d 1186, 1191 (11th Cir. 2004)(finding that conduct "by a government actor will rise to the level of a substantive due process violation only if the act can be characterized as arbitrary or conscience shocking in a constitutional sense")(internal citations omitted); *George Washington Univ. v. District of Columbia*, 318 F.3d 203, 209 (D.C. Cir. 2003)(finding that due process constrains only egregious government misconduct). Indeed, the dearth of decisions finding a substantive due process violation in the land-use context highlights the commitment to circumspect review on the part of the Circuit Courts.

In fact, a review of the post-*Lewis* cases cited by Petitioner reveals that only in one instance did a court find the degree of egregiousness necessary to support the plaintiff's substantive due process claim. Even then, the Fifth Circuit Court limited its holding to cases involving "blatant governmental interference with property rights" and emphasized the "particularly odd fact situation . . . [and] the length and degree of governmental abuse" present in the case before it. *Simi Investment*, 236 F.3d at 249 (finding that county's use of a non-existent park to interfere with private property interests represented arbitrary and capricious governmental action). More typically, the Circuit Courts routinely find the facts lacking the egregiousness necessary to support a substantive due process claim. *See, e.g., Iowa Coal Mining Co., Inc. v. Monroe County*, 257

F.3d 846, 853 (8th Cir. 2001)(finding that government's seemingly intentional nineteen-month delay in deciding on plaintiff's land use application failed to qualify as "truly irrational" conduct).

By whatever words, the Circuit Courts have echoed this Court's holding in *Lewis* that only conduct that "shocks the conscience" qualifies as sufficiently arbitrary and capricious. This concept is not a new one. Indeed, as the *Natale* Court recognized, using the "shocks the conscience" standard to determine whether the government acted in an arbitrary and capricious manner has long enjoyed acceptance in the substantive due process arena. *See, e.g., Natale,* 170 F.3d at 262-63. Likewise, the Sixth Circuit has recognized the arbitrary and capricious standard as "simply another formulation of, but no less stringent than, the more traditional 'shocks the conscience' standard." *Bowers v. The City of Flint,* 325 F.3d 758, 763 (6th Cir. 2003)(rejecting plaintiffs' argument that the city had violated their substantive due process rights when it failed to give a five-percent discount to those persons who paid their bills on time). Although the *Bowers* decision involved state-created contractual rights rather than zoning ordinances, the underlying principle of substantive due process analysis remains the same. Those issues capable of redress in state-based actions are not proper subjects for federal protection under the doctrine of substantive due process. *Id.* at 763-64.

The Circuit Courts' recognition that only the most egregious of governmental conduct invokes constitutional protection represents a commitment in federal jurisprudence to leave to the states that which properly belongs before the states.[6] Indeed, the post-*Lewis* cases cited by Petitioner underscore the tremendous importance that

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6 Petitioner cites to a law review article in support of his contention that "shocks the conscious" acts as a virtual bar to substantive due process actions. (Petition for Certiorari at 10.) In that article, the author advocated the adoption of the "shocks the conscience" standard by the Washington Supreme Court. The author did so because he argued that the adoption of the standard would bring Washington state "into step with federal case law and preserve the fundamental distinction between issues that should be resolved under state law and misconduct which is egregious enough to implicate an individual's federal constitutional rights." Eric Jenkins, *Challenging Land Use Actions Under Section 1983,* 74 Wash. L. Rev. 853, 880 (1999).

the Circuit Courts have placed on the distinction between those issues deserving resolution under state law and those issues involving misconduct egregious enough to implicate an individual's constitutional rights. *See Natale*, 170 F.3d at 262 ("arbitrary conduct that might violate zoning regulations as a matter of state law is not sufficient to demonstrate conduct so outrageously arbitrary as to constitute a gross abuse of governmental authority that will offend the substantive component of the Due Process Clause"); *Tri-County Paving*, 281 F.3d at 441 (finding existence of substantive due process claim belied where state courts are available for redress). The Circuit Courts' insistence on maintaining this state law/federal due process law distinction represents a recognition by the Circuit Courts of the inherent danger in qualifying actions that merely violate state law as arbitrary or irrational for purposes of due process analysis.

Regardless of the words used to describe the standard applied, Petitioner failed as a matter of law to show facts sufficient to establish a substantive due process violation. The conduct about which he complains was described by the Third Circuit Court to have been actions taken to meet the Board of Supervisor's "legitimate concerns" regarding health and safety. (App. 18-19.) The Third Circuit further found that Petitioner did not present sufficient evidence to support his claim of improper *ex parte* conduct. (App. 20-22.) Finally, with respect to the delay in the issuance of the building permit, the Third Circuit Court noted that "[a]t most, [Petitioner] tells a tale of overbearing conduct by a Township employee." (App. 25.) Petitioner would not have been able to show a substantive due process violation under any of the post-*Lewis* cases he relies on in support of his Petition.

The principles articulated in *Lewis* and in *City of Cuyahoga Falls* further clarified long-standing tenets of substantive due process analysis. Specifically, *Lewis* and *City of Cuyahoga Falls* affirmed the movement in federal jurisprudence towards the restriction of the use of substantive due process as a means to expand federal oversight of matters within the purview of the states. Although Petitioner attempts to create the appearance of a split amongst the Circuits, as demonstrated, the Circuit Courts have

remained united in their highly restrictive application of substantive due process analysis in the land-use context.

## CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

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(2)

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In The
# Supreme Court of the United States

BENNETT LEVIN,

*Petitioner,*

v.

UPPER MAKEFIELD TOWNSHIP, BUCKS COUNTY, PENNSYLVANIA; ROSE MARIE SAUTER; CONRAD BALDWIN; WILLIAM GUNSER; EDWARD X. FORD; JOHN TITTERTON; LAWRENCE SALTZMAN; JOHN WALSH; BARBARA HIRST; ROBERT GORRING; ERIC FISHER; MICHAEL FRANK; STEVEN HARRIS, ESQUIRE; GREGORY STURN, ESQUIRE; HARRIS & HARRIS, ATTORNEYS;

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## REPLY TO BRIEF IN OPPOSITION

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## REPLY TO BRIEF IN OPPOSITION

Petitioner submits this brief reply in support of his Petition for a Writ of Certiorari.

In their Brief in Opposition, Respondents argue that the Court's decision last year in *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188, 198 (2003) has "definitely settled the issue" of whether the "shocks the conscience" test should be applied to substantive due process arising out of claims zoning and land-use cases. (Opp. at 7). Respondents concede that "there may have been different standards applied before [*Cuyahoga Falls*]" by the various Courts of Appeal (*id.* at 2), but they assert that those Circuit conflicts have now been resolved by *Cuyahoga Falls*.

*Cuyahoga Falls*, however, did not purport to extend the "shocks the conscience" test to all substantive due process claims in the zoning and land use context.[1] In

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[1] Indeed, none of the three questions granted review in *Cuyahoga Falls* involved whether the "shocks the conscience" test should be extended to zoning and land use cases:

> (1) In considering a claim against a municipal corporation for intentional discrimination arising out of a facially neutral and judicially upheld referendum petition, may the court inquire into the motivations of a handful of the citizens who expressed support for the referendum and impute those motivations to the entire municipal corporation?
>
> (2) In light of the constitutional freedom of political expression, can a disparate impact claim under the Fair Housing Act be maintained against a municipal corporation for the alleged impact of the filing of a facially neutral and judicially upheld referendum petition?
>
> (3) Does the due process clause of the constitution require a municipal corporation to issue building permits when the underlying conditions for the issuance of building permits

(Continued on following page)

*Cuyahoga Falls*, this Court was addressing ministerial *executive* action, namely, the refusal of a city engineer to issue building permits, and it did not even mention, much less utilize, the "shocks the conscience" test:

> We need not decide whether respondents possessed a property interest in the building permits, because the city engineer's refusal to issue the permits while the petition was pending *in no sense constituted egregious or arbitrary government conduct. See County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (noting that in our evaluations of "abusive executive action," we have held that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense'").

538 U.S. at 198 (emphasis added).

Notwithstanding Respondents' categorical assertion that *Cuyahoga Falls* has "definitively settled the issue" of whether the "shocks the conscience" test applies to all substantive due process claims brought in zoning and land use cases (Opp. at 7), it is noteworthy that they have not cited *any* cases citing *Cuyahoga Falls* as support for application of that test. Instead, following *Cuyahoga Falls*, appellate courts have continued to utilize myriad different tests in these cases other than "shocks the conscience." Significantly, in *Greenbriar Village, LLC v. Mountain Brook, City*, 345 F.3d 1258 (11th Cir. 2003), which was a

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have not been met and the municipal corporation's withholding of the permits is required by the judgments of state courts of competent jurisdiction?

71 U.S.L.W. 3049.

zoning case, the Court of Appeals cited *Cuyahoga Falls* as support for the "arbitrary or irrational" test:

> Even if we were to find that the deprivation of the land disturbance Permit did implicate constitutional substantive due process protections, the City's actions were not so arbitrary or irrational as to compel us to find for Greenbriar. *See City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, 538 U.S. 188, 123 S. Ct. 1389, 1396, 155 L. Ed. 2d 349 (2003).

In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), this Court applied the "shocks the conscience" test to a substantive due process claim arising from a high-speed police chase. This Court recognized that such a stringent test was appropriate where the actions being challenged took place under exigent circumstances, and reflected "the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." *Id.* at 852, *quoting Whitley v. Albers*, 475 U.S. 312, 320 (1986).

Respondents' opposition fails to proffer any rationale whatsoever for extending the "shocks the conscience" test to zoning and land use cases, which represent the antithesis of a high-speed police chase. Cases such as this one involve elected officials deliberating under color of state law as legislators, on the one hand, and as administrative judges, on the other. Indeed, in *Lewis*, this Court recognized that substantive due process claims arising from high-speed police chases present "markedly different circumstances" then those arising from "normal pretrial custody." 523 U.S. at 851. The less-stringent "deliberate indifference" test is appropriate for the latter cases because "actual deliberation is practical," and "forethought

about an inmate's welfare is not only feasible but obligatory." *Id.*

Here, too, the zoning decisions giving rise to Petitioner's claims involved "actual deliberation" and "forethought" by the Respondents. Applying the "shocks the conscience" test adopted for high-speed police chase cases to the totally dissimilar zoning cases such as this case would be "the jurisprudential equivalent of a square peg in a round hole." *United Artists v. Township of Warrington*, 316 F.3d 392, 407 (3d Cir. 2003) (Cowen, J., dissenting). It would give local zoning officials *carte blanche* to infringe upon property rights, and deprive the landowner of any realistic means of vindicating the constitutional right to substantive due process.

In sum, the pervasive conflict in the Circuits that existed before *Cuyahoga Falls* still exists. This Court should grant certiorari to eliminate the longstanding confusion among the federal appellate courts and establish a uniform standard for substantive due process review in zoning and other land-use cases.

Respectfully submitted,

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